United States Court of Appeals
for the Second Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
SEP 22 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for
the Estate of ESGRO, INC., a
Debtor in Chapter XI,

Plaintiff-Respondent-
Appellant,

B

P/S

-against-

JOSEPH R. CROWLEY and HERBERT B.
SIEGEL, as Reorganization Trustees
for WHITE FRONT STORES, INC., et al.,

Defendants-Appellants-
Appellees.

On Appeal from the United States District Court
For the Southern District of New York

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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Date	Proceedings
7/28/76	Filed Appellant's Designation of Record and Statement of Issues.
8/4/76	Filed Appellee's Designation of Contents of Record on Appeal. f.
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9/2/76	Filed Transcript of Testimony dated 10/3/76.
9/2/76	Filed OPINION and ORDER #45032 (THE ESGRO CLAIM). The order appealed from is hereby set aside. The parties are directed to proceed in accordance with this opinion. So ordered Cannella, J. dated 9/1/76.
9/2/76	Filed BOND for undertaking costs on appeal, by Fireman's Fund American Insurance Co.
9/2/76	Filed NOTICE OF APPEAL to the USCA by Irving Sulmeyer from the order of the Hon. J. M. Cannella dated 9/1/76 setting aside the order of Hon. E. J. Ryan Bkcy Judge dated 7/23/76. M/n; f.

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* Although designated as part of the record on appeal to the District Court, a majority of the documents contained in the record on appeal before this court are not listed in the District Court's docket sheet. According to the District Court Clerk's Office, at Judge Cannella's request, the unlisted documents were sent directly from the Bankruptcy Court Clerk's Office to Judge Cannella, by-passing the clerk's office. The Clerk of the District Court, however, certified on September 13, 1976 that "original filed papers numbered 1 through 97, constitute the record on appeal in the above proceeding."

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Attorney for Esgro, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of INTERSTATE STORES, INC., etc., et al. Debtors.	In Proceedings for the Reorganization Nos. 74 B 614-802 inclusive PROOF OF CLAIM ON BEHALF OF ESGRO, INC.

1. The undersigned, Francis J. Esgro, who resides at 2020 Nichols Canyon Road, Los Angeles, California 90046, is the President of Esgro, Inc., a California corporation, which corporation is debtor in those certain Proceedings for an Arrangement No. 73-0250 pending in the United States District Court, Central District for California. Esgro, Inc. maintains its principle place of business at 3237 South Garfield Avenue, Los Angeles, California 90040. The undersigned, Irving Sulmeyer, Receiver, who is the duly appointed Receiver in bankruptcy of Esgro, Inc., is authorized as a matter of law to make this proof of claim on behalf of Esgro, Inc. and accordingly joins in said claim. Said Receiver maintains his place of business at 615 South Flower Street, Suite 601, Los Angeles, California 90017.

2. The following bankrupt entities in the above-

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entitled proceedings (hereinafter usually referred to jointly as "White Front Debtors") were, at the time of the filing of the petition initiating this case, and still are indebted to this claimant in a sum as yet unascertained but estimated to be $35,000,000.00: White Front Stores, Inc., a California corporation; White Front Costa Mesa, Inc., a Delaware corporation; White Front Downey, Inc., a Delaware corporation; White Front Thousand Oaks, Inc., a Delaware corporation; White Front South Sacramento, Inc., a Delaware corporation; White Front La Mesa, Inc., a Delaware corporation; White Front Oakland, Inc., a Delaware corporation; White Front San Jose, Inc., a Delaware corporation; White Front Sunnyvale, Inc., a Delaware corporation; White Front Sacramento, Inc., a Delaware corporation; White Front Pleasant Hill, Inc., a Delaware corporation; White Front Fresno, Inc., a Delaware corporation; White Front South San Francisco, Inc., a Delaware corporation; White Front Newark, Inc., a Delaware corporation; White Front Richmond, Inc., a California corporation; White Front Tacoma, Inc., a Washington corporation; White Front Seattle, Inc., a Washington corporation; and White Front Burien, Inc., a Washington corporation; Interstate Department Stores, Inc., a corporation, and Does I through XXX, inclusive.

3. The ground upon which the claim is asserted, and upon which liability on the part of White Front Debtors is claimed, is the following:

(A) Your claimant is informed and believes and thereon alleges that White Front Debtors, and each of them, during the relevant period in question so controlled and manipulated the affairs which existed among them that there existed and does exist an identity of ownership among each and all of the White Front Debtors such that to recognize the fiction of their separate

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corporate existence under the circumstances would sanction fraud and promote injustice.

(B) On or about December 1, 1970 Esgro, Inc. and the White Front Debtors entered into an agreement in writing concerning the license of and operation by Esgro, Inc. of residential interior departments in stores operated by each and all the White Front debtors except Interstate Department Stores, Inc. ("Interstate"). Said written agreement was amended, in writing, on several occasions between December 1970 and June 1972, and separate agreements for certain of the White Front Debtor stores in operation were executed (said agreement of December 1, 1970, together with amendements thereto and the separate store agreements are referred to hereinafter as "the agreement, as amended", and copies thereof are attached hereto in chronological order as Exhibits "A" through "G", inclusive).

(C) Pursuant to the agreement, as amended, the parties agreed in part that Esgro, Inc. or its affiliates were granted the right and license to operate residential interior departments concessions in each and all of the stores operated by White Front Stores, Inc., or its subsidiaries, with certain exceptions, for a term extending to 1987 (such stores where such right and license were granted are hereinafter sometimes referred to as the "White Front Stores").

(D) Your claimant is informed and believes and thereon alleges that prior to December 1970 White Front Debtors determined to either sell or close all or substantially all of said White Front Stores under circumstances which would prohibit or foreclose the continued operation of the concession for the operation of residential interior departments in such stores

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granted to Esgro, Inc. by said agreement, as amended.

(E) Continually from the date said determination was reached until in or about November of 1972 White Front Debtors concealed and failed to disclose to Esgro, Inc. their said intention to sell or close substantially all of the White Front Stores, and affirmatively represented to and assured Esgro, Inc. that such stores would remain open through the entire term of said agreement, as amended, and further, that additional White Front Stores would be opened by White Front Debtors and would thereupon become subject to said agreement, as amended.

(F) Your claimant is informed and believes and on that ground alleges that in or before early October 1972 White Front Debtors determined and resolved to in fact close and cease business in a majority of the said White Front Stores.

(G) Despite said determination and resolution and its anticipated and expected severe and adverse effect on the business of Esgro, Inc., White Front Debtors failed and refused to disclose to Esgro, Inc. such determination and resolution but rather, in order to induce it to continue to operate departments in all of said White Front Stores until the very day of such stores' closing without adequate or necessary provisions being made for a closing, misrepresented to Esgro, Inc. that, among other things, the said White Front Stores would continue operations and that there had been no resolution or determination made that any of the said White Front Stores would be closed.

(H) In reliance upon the truth of said misrepresentations Esgro, Inc continued operations in said White Front Stores and did not make adequate or necessary provision for

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the closing of said Stores.

(I) On or about December 15, 1973 White Front Debtors announced publicly and first informed Esgro, Inc. that White Front Debtors had resolved and determined to close twenty-one of the thirty-three said White Front Stores and that such closings would take place forthwith.

(J) Esgro, Inc. relied upon the truth of the said misrepresentations of White Front Debtors in continuing to expend monies, time and effort in connection with the creation, openings and operations of the said departments in the said White Front Stores, which monies, time and effort would not have been expended had Esgro, Inc. known of the true intentions, determinations and resolutions of White Front Debtors with regard to the sale or closing of the said White Front Stores.

(K) White Front Debtors did, in fact, close said twenty-one stores and as a result of the closing by said defendants of twenty-one of the thirty-three said White Front Stores, Esgro, Inc. could not adequately or economically operate the said departments in only the remaining twelve White Front Stores and could not continue to operate said remaining departments with the remaining threat of closure and claimant was required to cease and discontinue the operation of the said departments in these remaining White Front Stores also.

(L) As a direct and proximate result of the said misrepresentations and fraud of White Front Debtors, their unilateral breach of the said agreement, as amended, and their interferences with the contractual relations of Esgro, Inc. and/or rescission of the said agreement, as amended, Esgro, Inc. has

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been injured and damaged in an amount the exact extent of which is uncertain, but which includes the losses and expenses incurred in closing said departments and the lost future profits from the anticipated operations of said departments, and claimant is informed and believes and on that ground alleges that said injury and damage are in the amount of $33,758,972.00.

(M) The acts and omission of White Front Debtors set forth above were done willfully and maliciously, and Esgro, Inc. is further entitled to punitive damages in the amount of $5,000,000.00.

4. No judgment has been rendered on the claim here set forth.

5. No payments on this claim have been made, and accordingly no such payments have been credited or deducted.

6. This claim is not subject to any setoff or counterclaim, however, White Front Debtors contend to the contrary and have alleged that Esgro, Inc. has breached its covenant to pay rent under the amended agreement, which contention is denied by Esgro, Inc.

7. No security interest is held for this claim.

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8. This claim is a general unsecured claim.

DATED: August 27, 1974 ESCRO, INC., a California corporation

By____________________________
Francis J. Esgro, Its President

DATED: August 27, 1974 APPROVED AND CONSENTED TO

____
Irving Sulmeyer, Esquire
Receiver in Bankruptcy of
the Estate of Esgro, Inc.

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EIVED
APR 14 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re :

INTERSTATE STORES, INC., formerly :
known as INTERSTATE DEPARTMENT :
STORES, INC., et al., :

Debtors. :

---------------------------------x

Reorganization
Nos. 74 B 614-802
Inclusive

NOTICE

S I R S :

PLEASE TAKE NOTICE that upon the annexed application of the Trustees, the undersigned will apply to Honorable Edward J. Byan, Bankruptcy Judge, at the United States Courthouse, Foley Square, New York, New York, Room 236, on the 25th day of June 1976 at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order expunging the claim of Esgro, Inc., (No. 7273A) and granting such other and further relief as may appear just and proper.

NOTICE IS FURTHER GIVEN that pursuant to an order of the Honorable Edward J. Ryan, Bankruptcy Judge, the General Rule 9(c)(2) of the United States District Court for the Southern District of New York, all answering papers are required to be filed with the Honorable Edward J. Ryan, Bankruptcy Judge, Room 230, United States Courthouse, Foley Square, New York, New York with a copy of said papers served upon the attorneys for the Trustees at the office listed below not later than June 22, 1976.

Dated: New York, New York
April 9, 1976.

SHEA GOULD CLIMENKO KRAMER & CASEY

By: ______________________
A Member of the Firm
Attorneys for the Trustees
330 Madison Avenue
New York, New York 10017

A 10.

TO:

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SECURITIES & EXCHANGE COMMISSION
26 Federal Plaza
New York, New York 10007

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re :

INTERSTATE STORES, INC., :
formerly known as INTERSTATE
DEPARTMENT STORES, INC., et al., :

Debtors. :

-------------------------------x

Reorganization
Nos. 74 B 614-802
Inclusive

APPLICATION

TO: THE HONORABLE EDWARD J. RYAN
BANKRUPTCY JUDGE

The application of JOSEPH R. CROWLEY and HERBERT B. SIEGEL respectfully shows and alleges:

1. On May 22, 1974 the captioned debtors filed petitions under Chapter XI §322 of the Bankruptcy Act and, thereafter, an amended petition for reorganization pursuant to the provisions of Chapter X of the Bankruptcy Act was filed on June 13, 1974. Said amended petition was thereafter approved by order of this Court dated June 13, 1974. Pursuant to said order, your applicants were appointed, have qualified and are now acting as the Trustees of the captioned debtors, including the debtors formerly engaged in operating the White Front Discount Department Stores (the "White Front debtors").

2. Applicants seek to expunge a general unsecured claim filed by Esgro, Inc. in the amount of $38,758,972 (claim No. 7273A). A copy of said claim is annexed hereto as Exhibit A.

3. The grounds upon which the objections are based are as follows:

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(a) Upon information and belief, no false representations were made nor were any relied upon by Esgro, Inc., nor did Esgro, Inc. sustain any damages as alleged in the Proof of Claim;

(b) By agreement dated November 29, 1963, the terms of which were expressly incorporated into the agreement dated December 1, 1970 referred to paragraph 3(B) of the Proof of Claim, it was agreed that the White Front debtors had the right to terminate any of the leases pursuant to which the White Front Discount Department Stores were operating "in good faith for economic conditions or good business reasons". Upon information and belief, the decision to close the White Front Discount Department Stores in December of 1972 and thereafter was made in good faith for economic conditions or good business reasons;

(c) Upon information and belief, no decision was made to sell or close substantially all or a majority of the White Front Discount Department Stores as alleged in paragraph 3(D) and 3(F) of the Proof of Claim;

(d) Upon information and belief, Claimant Esgro, Inc. was incurring substantial losses as a result of its operatio of Residential Interior Departments in the White Front Discount Department Stores and, therefore was not damaged by their closing;

(e) Upon information and belief, in or about November of 1972, and for some time prior thereto, Esgro, Inc. and its various affiliates were in breach of various provisions of the agreements pursuant to which the Residential Interior Departments were operated in the White Front Discount Department

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Stores. By Notice dated November 20, 1972, Claimant Esgro, Inc. was notified by the White Front debtors of its various defaults and demand was made that said defaults be cured within fifteen (15) days as provided in the agreements between the parties. Upon Claimant's failure to cure said default, it was duly notified by notice dated December 8, 1972 of the White Front debtors' election to terminate the license agreements pertaining to the Residential Interior Departments.

4. By reason of the foregoing, the agreement upon which the Proof of Claim is based was lawfully terminated by the White Front debtors. In any event, the claim asserted in the Proof of Claim is precluded by the terms of the agreements between Claimant and the White Front debtors and is without basis in fact or in law.

5. Applicants request that any order entered herein shall be without prejudice to the rights of the debtors herein to assert any claim against the Claimant for any monies said debtors claim against said Claimant.

6. Applicants further request that any order entered herein shall not be deemed to be a determination that the particular debtor or debtors named in the Proof of Claim is the correct debtor or debtors, and that said order shall be without prejudice to a future application to make such determination.

7. No previous application has been made for the relief requested herein.

WHEREFORE, applicants seek an order expunging claim number 7273A filed by Esgro, Inc. and granting such other and further relief as may appear just and proper.

JOSEPH R. CROWLEY
and
HERBERT B. SIEGEL
Reorganization Trustees

By: S/
Herbert B. Siegel, Trustee

SHEA GOULD CLIMENKO KRAMER &
CASEY

By:
A member of the Firm
Attorneys for Trustees
330 Madison Avenue
New York, New York 10017
(212) 661-3200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

In re :

INTERSTATE STORES, INC., et al., :

Debtors, :

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI, :

Plaintiff, :

v. :

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation, :

Defendants.

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Reorganization Nos.
74 B 614 - 802

SUMMONS AND NOTICE OF TRIAL

To the above-named Defendants:

YOU ARE HEREBY summoned and required to serve upon Weil, Gotshal & Manges, Plaintiff's attorneys, whose address is 767 Fifth Avenue, New York, New York 10022, a motion* or an answer to the Complaint which is herewith served upon you, on or before ~~June 10,~~ May 19 1976 and file the motion or answer with this court not later than the second business day thereafter. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

YOU ARE HEREBY notified that pre-trial of the proceeding commenced by this Complaint has been set for ~~June 28~~ May 21, 1976 at 10 o'clock in the fore noon in Room 236, U. S. Courthouse, Foley Square, New York, New York.

/s/ Judge Edward J. Ryan
Bankruptcy Judge

By: /s/ Mrs. E.M.G. James

Date of Issuance:

May 11, 1976

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* If you make a motion, as you may in accordance with Bankruptcy Rule 712, that rule governs the time within which your answer must be served.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., *et al*.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants.

Reorganization Nos.
74 B 614 - 802

COMPLAINT UNDER RULE 10-601 FOR MODIFICATION OF STAY OF SUITS

BACKGROUND

1. Esgro is a California corporation presently the subject of a Chapter XI case pending in the United States

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District Court for the Central District of California, Arrangement No. 73-02510 (the "California Bankruptcy Court").

2. Sulmeyer is the receiver for the Chapter XI estate of Esgro appointed by the California Bankruptcy Court and is duly authorized to file this complaint.

3. On or about December 1, 1970, Esgro entered into a certain written agreement with White Front Stores, Inc., as amended from time to time between December 1970 and June 1972 (the "License Agreement"), pursuant to which Esgro or its affiliates were granted the right to operate liquor departments and residential interior departments in each and all of the stores operated by White Front Stores, Inc. or its subsidiaries [except certain stores as provided in the License Agreement], for a term extending to 1987.

4. Thereafter and in late 1973 or early 1974, Defendants ceased to operate twenty-one (21) of the thirty-three (33) "White Front Stores" in which Esgro and Triumph operated licensed departments.

5. Upon information and belief, prior to December 1970, Defendants determined to either sell or close all or substantially all of the "White Front Stores" under circumstances which would prohibit or foreclose the continued operation of residential interior and liquor departments by Esgro.

6. Continually from the date such determination was reached until in or about November 1972, Defendants concealed and failed to disclose to Esgro their intention to sell or close substantially all of the "White Front Stores" and affirmatively represented to and assured Esgro that such stores would remain open through the entire term of the License Agreement and further, that additional "White Front Stores" would be opened by Defendants and would thereupon become subject to the License Agreement.

7. Upon information and belief, in or before early October 1972, Defendants determined and resolved to in fact close and cease business in a majority of the "White Front Stores."

8. Despite said determination and resolution and its anticipated and expected severe and adverse effect on Esgro's business, Defendants failed and refused to disclose to Esgro such determination and resolution, but rather, in order to induce Esgro to continue to operate departments in all of the "White Front Stores" until the very date of such stores' closing without adequate or necessary provisions being made for a closing, misrepresented to Esgro that, inter alia, the "White Front Stores" would continue operations and that Defendants had made no determination or resolution to close such stores.

9. In reliance upon the truth of Defendants' misrepresentations, Esgro continued operations in the "White Front Stores" and did not make adequate or necessary provision for the closing of said stores.

10. On or about December 15, 1972, Defendants announced publicly and first informed Esgro that Defendants had resolved and determined to close twenty-one (21) of the thirty-three (33) "White Front Stores" in which Esgro operated licensed departments, such closings to take place forthwith.

11. In reliance upon the truth of Defendants' misrepresentations, Esgro continued to expend monies, time and effort in connection with the creation, openings and operations of licensed departments in the "White Front Stores," which monies, time and effort Esgro would not have expended had it known of the true intentions, determination and resolution of Defendants with regard to the sale or closing of "White Front Stores."

12. Upon the closing of the twenty-one (21) "White

Front Stores" and the threat of additional closings by Defendants, Esgro could not adequately or economically operate licensed departments in the twelve (12) remaining stores and was thereby required to cease and discontinue those departments as well.

13. On or about February 15, 1973, Defendants commenced an action against Esgro, Triumph Sales, Inc. and Francis J. Esgro in the Superior Court of the State of California, County of Los Angeles (No. C. 50105) (the "California Lawsuit"), asserting two hundred and eight (208) causes of action based, inter alia, on Esgro's purported failure to make scheduled payments under the License Agreement and for Esgro's purported wrongful possession of certain premises. The California Lawsuit sought damages under the License Agreement of $879,121.52.

14. Thereafter, and on March 13, 1973, and due largely to the financial distress incurred by reason of Defendants' wrongful conduct, Esgro was constrained to seek protection under the debtor relief provision of Chapter XI of the Bankruptcy Act and filed its Chapter XI petition with the California Bankruptcy Court.

15. Thereupon and by virtue of the California Bankruptcy Court's order of March 19, 1973, Defendants were stayed from continuing to proceed in the California Lawsuit.

16. Shortly thereafter, White Front Stores, Inc. filed a proof of claim in the amount of $1,495,628.12, "plus contingent sums," in the Esgro Chapter XI case.

17. Upon the application of Esgro, the California Bankruptcy Court entered an order on May 7, 1973, authorizing Esgro to defend the California Lawsuit and to assert any claims for affirmative relief against Defendants.

18. Thereupon, and on July 27, 1973, Esgro filed a

cross-complaint (the "Cross-Complaint") in the California Lawsuit, naming Defendants as cross-defendants, as well as certain unknown persons and entities.

19. The Cross-Complaint is based upon Defendants' breach of the License Agreement, fraud and misrepresentation and seeks damages in the estimated sum of $30,000,000, plus punitive and exemplary damages of $5,000,000.

20. On May 22, 1974, Defendants each filed with this court a petition for an arrangement under Chapter XI of the Bankruptcy Act. Thereafter, and on or about June 13, 1974, Defendants each amended its petition so as to comply with the provisions of Chapter X of the Bankruptcy Act.

21. By order dated June 13, 1974, this court approved Defendants' petitions, as amended, and appointed Joseph R. Crowley as independent trustee and Herbert B. Siegel, as additional trustee (the "Trustees").

22. The court's order of June 13, 1974, inter alia, stayed the continuation of the Cross-Complaint.

23. In order to preserve its rights against Defendants' Chapter X estates, and pursuant to this court's order that all creditors file claims with the Trustees by a date fixed or forever be barred from doing so, Esgro filed with this court a proof of claim against Defendants' estates (Claim No. 7273A) in the sum of $38,758,972.00.

24. On or about April 9, 1976, the Trustees filed an application with this court, seeking an order expunging the aforesaid claim filed by Esgro.

THE RELIEF REQUESTED AND THE REASONS THEREFOR

25. Pursuant to Rule 10-601(c) of the Rules of Bankruptcy Procedure, Sulmeyer requests an order modifying this

court's order of June 13, 1974 and the stay provisions of Rule 10-601(a), so as to authorize the continuation of the California Lawsuit and to permit Esgro to proceed with the Cross-Complaint.

26. The California Lawsuit and the Cross-Complaint involve complex issues of law and fact. Indeed, when confronted with the arduous task of liquidating the claim of White Front Stores, Inc. for the purpose of a deposit under Esgro's arrangement, the California Bankruptcy Court stated in its memorandum opinion of January 23, 1974, a copy of which is annexed hereto as Exhibit "A," that

> "In four days of trial this Court could not hear all the evidence necessary to prove and disprove the various claims and counterclaims of the parties.
>
> * * *
>
> "It is therefore ordered that the Debtor [Esgro] post the sum of $50,000.00 with the receiver to cover the White Front claim. It is also ordered that the Receiver deposit the sum in an interest bearing account until all claims and counterclaims of the parties be resolved by the Superior Court." [Emphasis supplied.]

27. The foregoing determination by the California Bankruptcy Court is either binding upon this court by virtue of the doctrine of res judicata, or as a matter of judicial comity, this court should follow the prior determination of its sister bankruptcy court, made after four (4) days of hearing.

28. Moreover, all of the facts and events relevant and material to a judicial determination of the parties' respective claims, occurred in California and, upon information, all of the witnesses having personal knowledge thereof, reside in California.

29. Esgro is entitled to a jury trial with regard to the issues raised in the California Lawsuit and the Cross-Complaint and intends to make demand therefor.

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30. It would be onerous and burdensome to Esgro's Chapter XI estate if Sulmeyer were required to litigate Esgro's claims in New York. Esgro conducts no business and has no employees who reside in New York. On the other hand, it would not be prejudicial to the Trustees to litigate the claims in California.

31. All of the Defendants are either California corporations or upon information and belief, conduct a substantial proportion of their business in California.

32. Upon information and belief, substantially all of Defendants' employees or former employees who are likely witnesses reside in California. It is unlikely that these individuals would voluntarily appear as witnesses in New York and upon information and belief, this court is without jurisdiction to compel their attendance at the trial.

33. Thus, unless the California Lawsuit and the Cross-Complaint are permitted to continue, Sulmeyer will be prejudiced in the prosecution of Esgro's claims against the Defendant estates.

34. Upon information and belief, the Trustees intend to prosecute Defendants' claims against Esgro in the California Lawsuit.

35. In connection with their objection to Esgro's claims, the Trustees have commenced pre-trial discovery before this court.

36. It would be onerous and burdensome to Esgro's estate and wasteful of judicial time and effort, for the Trustees' objection to proceed.

37. The continued prosecution of the California Lawsuit and the Cross-Complaint would enable all of the parties thereto to obtain expeditiously a complete resolution of the

entire controversy in one forum, whereas continuation of the Trustees' objection would only dispose of part of the controversy in a piecemeal manner.

38. Thus, the Trustees' objection to Esgro's claim should be dismissed and all discovery should proceed under the auspices of the Superior Court of California.

WHEREFORE, Sulmeyer requests judgment, as follows:

1. Modifying this court's order of June 13, 1974 and Rule 10-601 of the Rules of Bankruptcy Procedure, so as to permit the California Lawsuit and the Cross-Complaint to proceed to judgment.

2. Dismissing the Trustees' objection to the allowance of Esgro's claim.

3. Enjoining the Trustees from commencing or continuing with pre-trial discovery before this court.

4. Granting Sulmeyer such other and further relief as is just.

Dated: New York, New York
May 10, 1976

WEIL, GOTSHAL & MANGES
Attorneys for Irving Sulmeyer, as
Receiver for the Chapter XI
Estate of Esgro, Inc.
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

By
A Member of the Firm

ExG 10533-~~[illegible]~~32
Dupes

A25

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of ESGRO, INC., a California corporation, Debtor.	In Proceedings for Arrangement No. 73-02510 MEMORANDUM OPINION RE DEBTORS APPLICATION TO DETERMINE AMOUNT OF DEPOSIT FOR CLAIM OF WHITE FRONT, AND ORDER

White Front Stores, Inc., has filed herein a claim for $1,495,628.12 "plus contingent sums." The Debtor has filed its objections to this claim and also has applied to this court to determine the amount of deposit necessary for the debtor to post as to this claim at the time of confirmation of its plan.

An action is now pending in the Superior Court wherein White Front has sued the Debtor upon this claim and in which the Debtor has denied any liability to White Front and has filed its counterclaim against White Front for some $30,000,000.00.

In four days of trial this Court could not hear all the evidence necessary to prove and disprove the various claims and counterclaims of the parties. The Court, at the beginning of the hearings announced that it would borrow a term from the criminal law field and merely decide if there was "probable cause" shown with respect to the

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3-19-73-56M-1006

various claims.

The Court believes that the Debtor has shown "probable cause" that the White Front claim is excessive and that the Debtor has a substantial counterclaim against White Front. The evidence indicates that the amount of the minimum rental set forth in the notice of default of November 20, 1972 [Exhibit A] should be substantially reduced.

With respect to the closing of the White Front stores, the law is well settled that "one who learns that his statements, even if thought to be true when made, have become false through a change of circumstances has the duty before his statements are acted on to disclose the new conditions to the party relying on his original representations. [Koch v. Williams (1961) 193 C.A.2d 537, 14 Cal. Rptr. 429, 431; Stevens v. Marco (1957) 147 C.A.2d 357, 305 P.2d 669, 683; Fitzgerald v. McFadden (CA 2, 1937) 88 F.2d 639].

The evidence showed that White Front gave its concessionaires no notice of its intention to close a number of its stores, but rather, left it to the concessionaires to learn of this fact from the newspapers. The concessionaires were, therefore, not given the opportunity to minimize their losses in any way. The evidence is uncontradicted that as early as June, 1972, Mr. Esgro heard rumors that White Front was going to close some of its stores, and that he discussed those rumors with Mr. Epstein, who assured him the stores would not be closed. The evidence further shows that Mr. Esgro discussed those rumors with Mr. Epstein at least a dozen times, the last time being shortly before the newspaper announcement of the closing.

It is inconceivable to this Court that the senior vice-president and chief executive officer of White Front did not know of the plans to close the stores prior to October 1st. Certainly after October 1st Mr. Epstein knew of the proposed closing closing of the stores. Not only did he not communicate this information to the Debtor, but continued to assure Mr. Esgro that the stores would not close.

"Even where a fiduciary relationship is absent, one who speaks is not only obligated to tell the truth but he is equally bound not to suppress or conceal any facts within his knowledge which materially qualify those stated," [Harkness v. Fielder (1957) 150 C.A. 2d 528,310P, 2d 423, 429; Gillespie v. Ormsby (1954) 126 C. A. 2d 513, 527, 272 P, 2d 949, 958] " A party is under a duty to use diligence in making a complete disclosure of facts where partial disclosur may convey false impressions and mislead the plaintiff. Such half-truths or non-disclosures are considered to be concealment of facts and, therefore, misrepresentations" [Strand v. Librascope, Inc. (D.C.Mich. 1961) 197 F.S.743, 753. See also Stevens v. Torregano (1961) 13 Cal. Repr.604, 615; Gerstle v. Gamble-Skogmo, Inc. (D.C. N.Y. 1969) 298 F.S. 66,95)."

In view of the above recited law and facts, and upon all the evidence introduced, the court believes there is "probable cause" to believe that the Debtor has a substantial counterclaim against White Front. The Court also believes that the sum of $50,000.00 is sufficient deposit under the plan to cover the White Front claim.

It is therefore ordered that the Debtor post the sum of $50,000.00 with the receiver to cover the White Front claim. It is also ordered that the Receiver deposit this sum in an interest bearing account until all claims and counterclaims of the parties be resolved by the Superior Court.

Pursuant to F.R.C.P. 52a this memorandum is to constitute the findings of fact, conclusions of law and order in this matter.

Dated: January 23,1974

RAY H. KINNISON
Ray H. Kinnison
Bankruptcy Judge

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STATE OF NEW YORK, COUNTY OF **CERTIFICATION BY ATTORNEY**

The undersigned attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF **ATTORNEY'S AFFIRMATION**

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.: **INDIVIDUAL VERIFICATION**

deponent is the
read the foregoing
the same is true to deponent's ow
belief, and that as to those matter
Sworn to before me, this

STATE OF NEW YORK, COUNTY (

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named in the within action; that
and knows the contents thereof; a
stated to be alleged upon informa
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is a co
The grounds of deponent's belief

Sworn to before me, this

STATE OF NEW YORK, COUNTY (

being duly sworn, deposes and sa

That on the day of
upon

for that purpose by depositing a
depository under the exclusive car
Sworn to before me, this

ORIGINAL

AO Form No. 82-Rev.
Form approved by
Comp. Gen., U. S.
June 26, 1953.

RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK

NEW YORK CITY

RECEIVED FROM B/J-Ryan DATE 5/11/76

Docket No. 74B 614-802 (Pl.) (Def.)

ACCOUNT	AMOUNT	ACCOUNT	AMOUNT
Clerks Fees		Registry Cash Bail } ACCT. NO. 1	
Bankruptcy Filing Fee		Tender	
Referee's Sal. and Exp. Fund	15 00	Seaman's Wages ACCT. NO. 2	
		Unpaid Dividends in Bankruptcy ACCT. NO. 3	
Miscel. Earnings Copy			
Certificate		Other Moneys	
Search		Costs	
		Fine	
Nat'zn Fees Pet. Nos.			
Decl. Nos.			

Total ► 15.00

DEPUTY CLERK G. Harrison

Cash ☒ Check ☐ MONEY ORDER ☐

070186

© U.S. GPO : [illegible]

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF PERSONAL SERVICE**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
upon deponent served the within
the
person so served to be the person herein, by delivering a true copy thereof to h personally. Deponent knew the mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

In re :

INTERSTATE STORES, INC., *et al*., :

Debtors, :

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI, :

Plaintiff, :

v. :

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation, :

Defendants. :

- - - - - - - - - - - - - - - - - - X

Reorganization Nos.
74 B 614-802
Inclusive

ANSWER TO COMPLAINT UNDER RULE 10-601

The defendants, by their attorneys, Shea Gould Climenko Kramer & Casey, for their answer to the Complaint under Rule 10-601, of Irving Sulmeyer, as Receiver for the Estate of ESGRO, INC. ("ESGRO"), a Debtor in Chapter XI, allege:

FIRST DEFENSE

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint, except admit that ESGRO was the subject of a Chapter XI case pending in the United States District Court for the Central District of California, Arrangement No. 73-02510, (hereinafter the "California Bankruptcy Court") and alleges upon information and belief, that an order of confirmation of a plan of arrangement has been or will shortly be submitted to the California Bankruptcy Court.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint, except admit that Irving Sulmeyer was and, upon information and belief, still is, the Receiver for the Estate of ESGRO.

3. Deny each and every allegation contained in paragraph 3 of the Complaint, except admit that pursuant to an Agreement dated December 1, 1970, which was in the form of a further Amendment to an agreement between White Front Stores, Inc. and Francis I. Esgro dated December 1, 1962 which had from time to time prior to December 1, 1970 been amended (hereinafter the "Master Agreement"), ESGRO was granted the right to operate Residential Interior Departments in the various White Front Stores, subject to all of the terms and conditions contained in said December 1, 1970 Agreement and said Master Agreement; admit that said December 1, 1970 Agreement was amended from time to time subsequent to the date it was executed and respectfully

refer the Court to said December 1, 1970 Agreement, as amended, and said Master Agreement for a complete statement of their terms and conditions.

4. Deny each and every allegation contained in paragraph 4 of the Complaint and allege that operation of 21 of the 33 White Front Stores in which ESGRO operated Residential Interior Departments was discontinued in late 1972 and early 1973.

5. Deny each and every allegation contained in paragraph 5 of the Complaint.

6. Deny each and every allegation contained in paragraph 6 of the Complaint.

7. Deny each and every allegation contained in paragraph 7 of the Complaint.

8. Deny each and every allegation contained in paragraph 8 of the Complaint.

9. Deny each and every allegation contained in paragraph 9 of the Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegations respecting the adequacy of provisions made by ESGRO for closing its Residential Interior Departments in the White Front Stores.

10. Deny each and every allegation contained in paragraph 10 of the Complaint, except admit that on or about December 15, 1972 an announcement was made that 21 of the 33 White Front Stores in which ESGRO operated Residential Interior Departments would be closed in the near future.

11. Deny each and every allegation contained in paragraph 11 of the Complaint, and allege that by letter dated November 20, 1972 White Front Stores, Inc. and various of its

affiliated corporations gave ESGRO formal notice of ESGRO's various defaults under the Master Agreement, as amended, and the December 1, 1970 Agreement relating to the operation of the Residential Interior Departments and upon ESGRO's failure to cure said default, terminated the license agreements pursuant to which ESGRO had theretofore operated the Residential Interior Departments.

12. Deny each and every allegation contained in paragraph 12 of the Complaint and allege that ESGRO was never able to adequately or economically operate the Residential Interior Departments in the White Front Stores even when it was operating 33 such departments and further alleges that by letter dated November 20, 1972 White Front Stores, Inc. and various of its affiliated corporations gave ESGRO formal notice of ESGRO's various defaults under the Master Agreement, as amended, and the December 1, 1970 Agreement relating to the operation of the Residential Interior Departments and upon ESGRO's failure to cure said default, terminated the license agreements pursuant to which ESGRO had theretofore operated the Residential Interior Departments.

13. Deny each and every allegation contained in paragraph 13 of the Complaint, except admit that the California Lawsuit was commenced by White Front Stores, Inc. and various of the other Debtors in the within proceeding, on February 15, 1973 and the complaint therein asserts 208 causes of action and respectfully refer the Court to said complaint for a full and complete statement of the position of the plaintiffs in said lawsuit.

14. Deny each and every allegation contained in paragraph 14 of the Complaint, except admit that on or about March 13, 1973 ESGRO, INC. filed a petition under Chapter XI of the Bankruptcy Act in the United States District Court for the Central

District of California.

15. Deny each and every allegation contained in paragraph 15 of the Complaint, except admit that the plaintiffs in the California Lawsuit were, by virtue of the California Bankruptcy Court's order of March 1973, stayed from continuing to proceed with the California Lawsuit.

16. Admit the allegations contained in paragraph 16 of the Complaint and alleges that on April 29, 1976 the defendants filed an amended Proof of Claim in the amount of $1,747,615.11 plus contingent sums in the ESGRO Chapter XI case.

17. Deny each and every allegation contained in paragraph 17 of the Complaint, except admit that the California Bankruptcy Court entered an order on May 7, 1973 and respectfully refer the Court to said order for a complete statement of its provisions.

18. Deny each and every allegation contained in paragraph 18 of the Complaint, except admit that on ~~January~~ July 27, 1973 ESGRO filed the cross-complaint in the California Lawsuit naming White Front Stores, Inc. and other persons and entities as cross-defendants.

19. Deny each and every allegation contained in paragraph 19 of the Complaint, except admit that the cross-complaint seeks "compensatory damages in the amount of $30,000,000, or as proven at trial," plus punitive and exemplary damages in the amount of $5,000,000 against the defendants named therein.

20. Deny each and every allegation contained in paragraph 20 of the Complaint, except admit that on May 22, 1974 the above-captioned Debtors filed petitions under Chapter XI of the Bankruptcy Act and thereafter, on June 13, 1974, an amended

petition for reorganizational pursuant to the provisions of Chapter X of the Bankruptcy Act was filed.

21. Deny each and every allegation contained in paragraph 21 of the Complaint, except admit that by Order dated June 13, 1974 this Court approved the petition referred to above, as amended, and appointed Defendants herein as Trustees of the captioned Debtors.

22. Admit the allegations contained in paragraph 22 of the Complaint.

23. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint, except admit that ESGRO filed with this Court a proof of claim (No. 7273A) in the sum of $38,758,972.00.

24. Admit the allegations contained in paragraph 24 of the Complaint.

25. Admit the allegations contained in paragraph 25 of the Complaint.

26. Deny each and every allegation contained in paragraph 26 of the Complaint, except admit that the California Bankruptcy Court issued a memorandum decision dated January 23, 1974 and respectfully refers the Court to the pleadings in the California Lawsuit for a complete description of the issues involved therein.

27. Deny each and every allegation contained in paragraph 27 of the Complaint.

28. Deny each and every allegation contained in paragraph 28 of the Complaint.

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 of the Complaint.

30. Deny each and every allegation contained in paragraph 30 of the Complaint, except denies knowledge or information sufficient to form a belief as to whether ESGRO conducts business or has employees who reside in New York.

31. Deny each and every allegation contained in paragraph 31 of the Complaint.

32. Deny each and every allegation contained in paragraph 32 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations with respect to whether various individuals would voluntarily appear as witnesses in New York and alleges that any such witness whose attendance at the trial could not be compelled by the Court would be subject to discovery pursuant to the Bankruptcy Rules.

33. Deny each and every allegation contained in paragraph 33 of the Complaint.

34. Deny each and every allegation contained in paragraph 34 of the Complaint except admit that they intend to prosecute the debtors claims against ESGRO.

35. Admit the allegations contained in paragraph 35.

36. Deny each and every allegation contained in paragraph 36 of the Complaint.

37. Deny each and every allegation contained in paragraph 37 of the Complaint.

38. Deny each and every allegation contained in paragraph 38 of the Complaint.

SECOND DEFENSE

39. With respect to the allegations contained in paragraphs 3 through 12 of the Complaint, which are substantially identical to the allegations contained in ESGRO's Proof of Claim No. 7273A, the Court is respectfully referred to the Application of defendants to expunge said claim for a statement of defendant's position in connection therewith. The allegations contained in said application, specifically the allegations contained in paragraphs 3 and 4 thereof, are incorporated herein by reference.

THIRD DEFENSE

40. ESGRO's Claim No. 7273A for $38,758,972 represents approximately 17% of the total outstanding claims in this proceeding as of the date hereof and is by far the single largest claim filed in this proceeding.

41. By reason of the foregoing, the unresolved status of the defendants' objection and application to expunge ESGRO's Claim No. 7273A is the most formidable obstacle to the formulation and filing of a plan of reorganization in this proceeding in that:

(a) the question of whether or not the Debtor is solvent cannot at this time be determined unless said claim is resolved;

(b) if said claim is presumed to be valid — which it must be until a contrary adjudication is made — it will have a material effect on the type of plan which can be formulated.

42. Should the California Lawsuit be permitted to continue and should the defendants be directed to litigate the merits of ESGRO's Claim 7273A in the California Supreme Court, which would be the effect of the relief demanded in the Complaint, the ability of the defendants to formulate a plan will be adversely affected.

FOURTH DEFENSE

43. The defendants and their Court appointed counsel have to date done a substantial amount of work in connection with the application to expunge Claim No. 7273A filed by ESGRO. Concurrent with the service of the Notice and Application to expunge the claim on April 9, 1970, Interrogatories and a Notice to Admit were served. Also, on April 9, 1976, a Notice to take the Deposition of ESGRO by its president, Francis Esgro, was served setting said deposition for May 24, 1976. In addition, on May 10, 1976 additional notices were served to take the depositions of one Harry Epstein and one Ron Wood in California on June 8 and June 9, 1976, respectively.

44. In addition, Counsel for the Trustees has done a substantial amount of work in order to prepare for the hearing on the objections to ESGRO Claim No. 7273A. All files in the Trustees' possession relating to the dealings between the Debtors and ESGRO, which are physically located in New York, have been carefully reviewed, there have been extensive discussions with the Debtors' prior California Counsel and a number of potential witnesses have been interviewed both in New York and in Los Angeles, California.

45. By reason of the foregoing, Counsel for the Trustees is fully familiar with the dealings between the Debtors

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and ESGRO and is in a better position than anyone else to prosecute the objections to ESGRO's claim and obtain an early adjudication of the merits of said claim.

46. By reason of the extensive work already done, all pretrial proceedings with respect to the defendants' application to expunge ESGRO's Claim No. 7273A could be completed by July 1, 1976 and, subject to the Court's calendar, the application could be tried any time thereafter.

47. Upon information and belief the California Lawsuit cannot be reached for trial, even if the parties proceed expeditiously with discovery, until mid 1978.

FIFTH DEFENSE

48. The stay of the California Lawsuit pursuant to Rule 10-601 has been in effect since June 13, 1974. Between that date and May 10, 1976, plaintiff took no action whatever to obtain relief from said stay. It was only when the defendants served their application to expunge ESGRO's Claim No. 7273A and commenced discovery proceedings in connection therewith and after waiting an additional 30 days, that plaintiff sought relief from said stay.

49. By reason of the foregoing, it is apparent that plaintiff has no intention of proceeding with the prosecution of the cross-complaint filed in the California Lawsuit and has instituted the instant action only in an effort to further delay the adjudication of Claim 7273A which is substantially identical to the cross-complaint filed in the California Lawsuit.

WHEREFORE, defendants request that judgment be entered dismissing plaintiff's complaint and for such other and further relief as to the Court seems just and proper.

SHEA GOULD CLIMENKO KRAMER & CASEY

By s/ Lester Yassky
A Member of the Firm

Attorneys for Defendants-Trustees
330 Madison Avenue
New York, New York 10017

(212) 661-3200

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

IN RE:

INTERSTATE STORES, INC, et al,
Debtors

74 B 614-802

versus

IRVING SULMEYER, As Receiver
for the Estate of ESGRO, INC.,
a Debtor in Chapter XI,

May 21, 1976
10:30 a.m.

versus

JOSEPH R. CROWLEY and
HERBERT B. SIEGEL, et al,
Defendants

HEARING TO MODIFY OR LIFT STAY

Before:

HONORABLE EDWARD J. RYAN,
Bankruptcy Judge

GERALD I. METZ, C.S.R.
OFFICIAL COURT REPORTER

APPEARANCES:

MESSRS. SHEA, GOULD, CLIMENKO, KRAMER & CASEY
Attorneys for Trustees
BY: LESTER YASSKY, ESQ.
DANIEL L. CARROLL, ESQ.,
Of Counsel
330 Madison Avenue
New York, N. Y.

MESSRS. WEIL, GOTSHAL & MANGES
Attorneys for Plaintiff, Esgro, Inc.
BY: BRUCE ZIRINSKY, ESQ.
LAWRENCE MITTMAN, ESQ.,
Of Counsel
767 Fifth Avenue
New York, New York

MESSRS. ZALKIN, RODIN & GOODMAN
Attorneys for Senior Institutional Lenders
BY: HENRY L. GOODMAN, ESQ.
JAMES GLASS, ESQ.,
Of Counsel
750 Third Avenue
New York, New York

ALSO PRESENT:

PROF. JOSEPH R. CROWLEY, Trustee

HERBERT B. SIEGEL, Trustee

* * * * *

MR. ZIRINSKY: The matter before the Court this morning is the complaint under Rule 10-601 of the Rules of Bankruptcy Procedure. It's a complaint of

BEST COPY AVAILABLE

Irving Sulmeyer as Receiver for the Chapter XI estate of Esgro, Inc. The Chapter XI case of Esgro, Inc., is pending in the Central District of California, bearing docket number 73-02510.

Your Honor, we do have a stipulation with Messrs. Shea, Gould, Climenko, Kramer and Casey with regard to various documents which include the previous agreements between the parties, the pleadings in the State court action and various other documents, and we would like to submit to your Honor at this time a complete set of the documents with a stipulation setting forth by number each document included therein.

THE COURT: All right, thank you.

MR. ZIRINSKY: We would also like to submit to your Honor a set of marked pleadings in this matter.

MR. CARROLL: May I make two comments on the stipulation on the documents. We entered into the stipulation with the understanding that, first of all, we would check the documents more thoroughly. I didn't get a chance to look through this voluminous pile to see that every page was correct, to see that they are complete and, secondly, that the plaintiffs would stipulate that any document we felt should be included in addition to what is in this folder, they would stipulate as to the authenticity of and include it in the record.

MR. ZIRINSKY: That is correct.

MR. CARROLL: Also, on the pleadings, your Honor, we do have a correction to the answer on page 5, paragraph 18. There is a date, July 27, 1973, and that should be -- the date is January 27. It should be July 27, '73.

MR. ZIRINSKY: What paragraph is that, now?

MR. CARROLL: It's paragraph 18 on page 5. It refers to the date the Esgro cross-complaint was filed in the California action.

MR. ZIRINSKY: I also have two

documents which are included on the list and on the stipulation. However, we just got copies of these documents this morning. They are not included in the binder, but they are designated as item numbers 25 and 26 on the stipulation of documents. These two exhibits are a proof of claim and amended proof of claim filed by White Front and of the amended claim filed by the trustees in the Esgro Chapter XI case in the Central District of California.

Your Honor, the background of this dispute is that Esgro and White Front were parties to certain agreements, whereby Esgro was granted the right to operate licensed departments in various White Front department stores operated in California and in certain other states in the West. The original agreement between the parties was entered into on December 1, 1962, and was amended and supplemented from time to time by various written amendments, supplemental agreements, et cetera, all of which are included in the documents submitted to the Court.

Your Honor, on or about December 15, 1972, White Front made a public announcement that 21 of the 33 White Front Stores in which Esgro operated licensed department stores for the sale of residential interior goods would be closed forthwith. Shortly thereafter, your Honor, Esgro ceased operations in the additional 12 stores which were not closed by White Front at that time.

On February 15, 1973, White Front and various of its affiliates commenced the California suit against Esgro, Triumph Sales, Inc., which was an affiliate of Esgro, and Mr. Francis Esgro, who is the principal of Esgro, Inc.

(Pause)

THE COURT: All right, we had Mr. Esgro being joined as a defendant.

MR. ZIRINSKY: As well as Triumph Sales, Inc.

The complaint of White Front in the California suit asserts 208 causes of action against Esgro, Triumph and Mr.Francis Esgro and seeks damages under the agreement. The original complaint in the California lawsuit prayed for damages in the approximate vicinity of $800,000.

On March 13, 1973, which was less than one month after the commencement of this lawsuit by White Front, Esgro was constrained to file a Chapter XI petition with the California Bankruptcy Court. On March 19, 1973, the California Bankruptcy Court entered an order staying the continuation of the California lawsuit which had been commenced by White Front.

THE COURT: White Front commenced the action when?

MR. ZIRINSKY: February 15, 1973.

THE COURT: And the stay went into effect when?

MR. ZIRINSKY: March 19, 1973.

THE COURT: All right.

MR.ZIRINSKY: Your Honor, thereafter White Front Stores filed a proof of claim in the Esgro Chapter XI case in the amount of $1,495,628.12, plus contingent sums. Recently, your Honor, on April 29, 1976, less than a month ago, the Reorganization Trustees filed an amended proof of claim in the Esgro Chapter XI case in the amount of $1,747,615.11, plus contingent sums.

By order dated May 7, 1973, your Honor, the California Bankruptcy Court authorized Esgro and Mr. Sulmeyer, as receiver, to retain counsel for purposes of defending the California lawsuit in the Superior Court of California, and for the purpose of asserting any and all affirmative claims for relief on behalf of the estate of Esgro.

Pursuant to that order, your Honor, the law firm of Gibson, Dunn and Crutcher of Los Angeles was retained as special counsel, said firm having performed legal services to Esgro in connection with this matter prior to the Chapter XI.

Thereafter, your Honor, Esgro and

the other defendants, with the exception of Mr. Esgro, filed an Answer in the California lawsuit to the complaint.

On July 27, 1973, Esgro filed a crosscomplaint in the California lawsuit naming White Front Stores, the other debtors, which are captioned in the complaint in this adversary proceeding, and certain unnamed and unknown parties as cross-defendants. The cross-complaint of Esgro sought estimated compensatory damages in the sum of $30 million, plus punitive damages in the sum of $5 million.

Your Honor, before the California lawsuit and the proceedings on the cross-complaint could proceed much further, on May 22, 1974, White Front and the other debtors in the Chapter X cases filed Chapter XI petitions with this Court, which petitions were amended on June 13, 1974, so as to comply with the provisions of Chapter X. The petitions were approved by order of this Court of the same date and the trustees were appointed as reorganization trustees and have continued to act in such capacity.

By virtue of the foregoing, your Honor, continued prosecution of the cross-complaint in the California court was stayed.

Your Honor, this Court, after the Chapter X petition had been approved, entered an order fixing a bar date for the filing of claims in the Chapter X cases.

Pursuant to that order, Esgro, with the receiver, Mr. Sulmeyer, joining in the proofs of claim, filed claims against the various captioned debtors' estates based on the same claims which had been asserted in the cross-complaint in the California court.

The amount of the proof of claim in the Chapter X cases is $38,758,972. The claim is designated as number 7273 A in these proceedings.

Your Honor, recently, and on or about April 9, 1976, the trustees filed an application with this Court seeking an order expunging Esgro's claim in its entirety. It should be noted that in connection with the trustees' objection to the claim, your Honor, they have not asserted a counterclaim against Esgro which would in essence be based upon the original complaint filed in the California lawsuit but, rather, they have proceeded, after the filing of the objection in this court, to amend White Front's claim in the Esgro Chapter XI case, the clear implication to us being that the trustees intend to proceed to litigate their claims against Esgro in California, whether it be the Superior Court of California or the Bankruptcy Court for the Central District of California.

In this connection, your Honor, I would like to point the Court's attention to a memorandum opinion entered by the California Bankruptcy Court in January of 1974, which was rendered after four days of hearing on an application by Esgro to fix the amount of a deposit on White Front's claim for purposes of confirmation of an arrangement in the Chapter XI case.

Your Honor, the California Bankruptcy Court fixed a deposit in the sum of $50,000, to be held in an interest-bearing account pending final resolution of the disputes between the parties by the Superior Court of California.

Your Honor, the issues presented to this Court today are, in essence, whether or not this Court should exercise its discretion and modify the stay extant pursuant to Rule 10-601.

Your Honor, the leading case in this area is Foust v. Munson Steamship Lines, which is a Supreme Court decision reported at 299 U.S. 77, and in that decision, your Honor, the Supreme Court held that a reorganization Court is to exercise its injunctive powers according to the particular circumstances of the case and is to be guided by considerations that under the law make for the ascertainment of what is just to the claimants, the debtor and the estate.

A more recent decision, your Honor, in this District, in re: Zeckendorf, which is in the Southern District, reported at 326 F. Supp., 182 (a 1971 decision), citing the Supreme Court decision in Foust v. Munson, the Court went on to say that a stay should not be rigidly enforced when no sound reason is shown to require it and where there is good reason for its modification. The stay is not a matter of right.

Most recently, your Honor, in the matter of Groundhog Mountain Corporation, Judge Babbitt of this court rendered a decision dated May 6, 1975, wherein he stated that, while there seemed to be no standardized criteria for the exercise of a judgment permitting suit against a debtor, whatever criteria considered by the Court should bear a rational basis to the point of the proceedings in which they arise, the balance of hurt between the parties, the nature of the interest to be protected and the overall congenial statutory purpose of Chapter XI.

We submit, your Honor, the same considerations would apply to a case under Chapter X.

Your Honor, there are many, many good reasons why the stay should be modified in this case, so as to permit the California lawsuit to proceed, and the prosecution of Esgro's cross-complaint.

Number one, Esgro is entitled to a jury trial on the factual issues, which are numerous and complex, arising both from the 208 causes of action asserted by White Front, as well as the claims of breach of contract, fraud, misrepresentation, and various other matters alleged by Esgro in its cross-complaint. The amount of money involved, your Honor, is very substantial. Esgro has alleged damages in excess of $30 million. We believe, your Honor, that a jury trial is essential to the determination of the

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issues, the damages and the various other matters which are going to come to a head in any judicial resolution of the disputes between the parties.

The California constitution and California statutory law guarantees litigants the right to a jury trial in claims arising out of matters of this nature. The decisional law of California has made it abundantly clear that the right to a jury trial on claims of the nature asserted in these cases is an absolute right, and the parties are entitled to it. Moreover, as was stated by the Supreme Court in Foust v. Munson, "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Moreover, your Honor, California law most likely governs the disputes between the parties. There are no bankruptcy issues present in these disputes. They are basically questions of State law, the interpretation that the Courts of the State of California wish to give to these agreements as to transactions arising and occurring in the State of California between parties conducting their business in the State of California.

The agreements were negotiated and executed in California, and substantial performance of the agreements occurred in California.

Moreover, your Honor, White Front's operations were centered in California. Esgro is centered in California and has no office or employees in New York or in the East Coast. Most, if not all, of the witnesses having personal knowledge of the facts relevant and material to the disputes reside in California. Many of these witnesses are not parties. They are no longer employees of parties. They could not be compelled to come to a trial before this Court by compulsory process.

Your Honor, as indicated by this, the trustees in connection with their objection to Esgro's claim in this Court have already noticed three depositions, a deposition of Mr. Frank Esgro, deposition of a Mr. Harry Epstein and a deposition of Mr. Ron Wood, all of which depositions are noticed to take place in California, which indicates, your Honor, that the sources of proof are essentially in California.

Moreover, your Honor, there are additional parties to the California lawsuit who are not present before this Court. They cannot be compelled to appear before this Court. Therefore, this Court could not render a decision which would be binding upon all of the parties. You would have the potential threat of a multiplicity of actions with possibly inconsistent results.

Your Honor, all of these factors are pertinent to the interests of justice and the convenience of the parties and witnesses and weigh upon the balance of hurt to be borne by Esgro, should the stay not be modified.

As the Supreme Court has stated in the Gulf Oil versus Gilbert case, which is reported at 330 U.S. 501, this Court in one form of words or another has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances. The important considerations in this determination are (1) the relative ease of access to the sources of proof, the availability of compulsory process for the attendance of unwilling witnesses, and the cost of obtaining the attendance of unwilling witnesses, all of the practical problems that make the trial of a case easy, expeditious and inexpensive.

The Court went on further to state that there is a local interest in having localized controversies decided at home. There is an appropriateness in having a trial in a forum that is at home, with the State law that must govern the case, and finally the Court stated certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on depositions is to create a condition not satisfactory to Court, jury or most litigants.

Your Honor, where the interests of justice and the convenience of the parties and witnesses so require, Bankruptcy Courts have adhered to the principles enunciated by the Supreme Court in the Gulf Oil case. Examples of this, your Honor, are the case of First National Bank of White River Junction versus Reed, which is reported at 306 F. 2d, 481, where the Court of Appeals stated that, "Questions of State law are best left to State courts, in certain circumstances."

Likewise, your Honor, the case of Wilke v. Country Life Insurance Company reported at 423 F. 2d, 151, where the complete relief cannot be awarded among

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the interested parties, the Court should decline jurisdiction.

Your Honor, the trustees would have this Court try the identical issues which will have to be tried on their claims against Esgro in California, be it in the Superior Court of California or in the California Bankruptcy Court. As previously stated, the California Bankruptcy Court has already expressed its inclination that the case should proceed in the State court, not before the Bankruptcy Court.

Continuation of the stay, your Honor, would entail a multiplicity of actions, wasteful of judicial time and effort and a substantial burden and expense to the parties with a potential evil of inconsistent results by different courts.

As stated by the Second Circuit in the case of U.S. v. Eastport Steamship Corporation, reported at 255 F. 2d, 795, and I quote from the Court's opinion at page 802:

"Recognition of the interest of judicial administration in avoiding a multiplicity of actions, each based on the same facts, has logically led to the adoption of statutes and court rules providing for the effective settlement at one time of all disputes of which parts are already before this Court."

Your Honor, as against all of this, what are the reasons proferred by the trustees in opposition to a modification of the stay? And in this context, your Honor, it must be remembered that the trustees have the burden of proof in insisting on a continuation of the stay, and this is supported by Foust v. Munson as well as the Zeckendorf decision.

First, your Honor, the trustees contend that Esgro's claims are frivolous. This is merely an assertion on their part. The merits of the claims of the respective parties are not presently at issue before this Court. The only issue before this

Court is, should the claim be litigated here in this Court, or should the stay be modified so as to allow it to proceed expeditiously to litigation in California?

Moreover, your Honor, Judge Kinneson of the California Bankruptcy Court, after four days of hearings -- and these were full days of hearings, your Honor -- determined that White Front's claims were somewhat exaggerated and that Esgro's claims appeared meritorious. Frivolity of the claims of Esgro is further belied by the trustees' apparent need of extensive discovery in connection with their objection to the claim.

Second, your Honor, the trustees contend that a plan of reorganization cannot be formulated until Esgro's claim is resolved. That's not necessarily true, your Honor. Contingencies can always be built into any plan to provide for expected recoveries or expected liabilities.

Nonetheless, your Honor, assuming that to be true, it's not really an adequate reason to deny the modification of the stay in these circumstances, and the fact that modification of a stay so as to permit an action to proceed in State court may perhaps delay the conclusion of a reorganization case has been held by the Courts not to be in and of itself an adequate reason for denying modification.

I would cite the Court to the cases of In Re: Laufer, In Re: Adolf Gobel and In Re: Beck Industries.

THE COURT: I thought that the Foust case gave special emphasis to the fact that unless there were to be an impediment to reorganization, the Court must grant a transfer to the State court for trial of the claim.

MR. ZIRINSKY: I believe that's correct, your Honor, that unless the trustees could sustain a burden that it would be an actual embarrassment to the administration of the estate, the stay should be modified in the circumstances of that case.

Furthermore, your Honor, the trustees apparently use this argument to suit their needs throughout these Chapter X cases. At a hearing conducted before this Court on December third, 1975, a copy of the transcript of which I happen to have with me, counsel for the trustees said at that time that modification of the stay would impede the filing of a plan, which it was expected would be filed within six months, unless something unexpected arose.

Your Honor, clearly the trustees have known about Esgro's claim in this reorganization case for quite some time. The claim was not unexpected, yet the trustees delayed until April 9, 1976, to bring on an objection to the claim, a claim in excess of $35 million and which the trustees now contend is so substantial that they can't do anything in the reorganization cases until it's resolved.

Your Honor, we don't think the

argument has any merit.

Third, your Honor, the trustees contend that the New York counsel has already done so much work in acquainting themselves with the facts and issues of the California lawsuit that they are the best ones to try the case.

Well, your Honor, White Front did have California counsel representing it in these actions, the firm of Loeb and Loeb. As a matter of fact, a member of that firm is here in Court today. This firm, your Honor, is intimately acquainted with the facts and the disputes between the parties, and I'm sure would be more than competent to proceed to trial in the California Superior Court.

Moreover, your Honor, it does not take much effort to prepare and serve notices of deposition in a reorganization case, and other than that, your Honor, the set of interrogatories which has been prepared and filed by the firm of Shea, Gould on behalf of the trustees is

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really nothing more than a duplication of interrogatories that had already been filed in the State court action three years ago.

Fourth, your Honor, the trustees assume that the disputes can be tried more quickly before this Court than in the California Superior Court.. Your Honor, that's not necessarily true. I ask this Court merely to take judicial notice of its own calendar conditions and the congestion of its calendar.

Your Honor, it's anticipated by counsel for Esgro -- and I really don't think it can be disputed -- the documents are voluminous, the issues, the 208 causes of action asserted by White Front, the complicated defenses and counterclaims asserted by Esgro in its cross-complaint -- your Honor, it's estimated it will take five to six weeks of actual trial to resolve all of the disputes in this matter.

Your Honor, although it is true

that calendar conditions in the Superior Court of California, in Los Angeles, are crowded, in normal circumstances it takes as much as a year to get a trial date.

I am advised by California counsel that the California courts will entertain motions for a priority on the trial calendar in exceptional circumstances, and we believe, your Honor, that if the parties to this dispute cooperate with one another, that a joint application to the Superior Court of California would most likely be granted, and the case could probably, depending on how quickly the parties would proceed with discovery, be tried within eight months from today.

THE COURT: Have you ascertained whether in fact they do give priorities specifically to bankruptcy matters?

MR. ZIRINSKY: Your Honor, I have with me Mr. Arthur Sherwood, who is a member of the firm of Gibson, Dunn and Crutcher. Mr. Sherwood has looked into this matter in the past several days and perhaps he could speak to that more appropriately than I could.

THE COURT: If you would, sir.

Under our local rule, priority is given to matters involving a bankruptcy trustee or receiver on the civil side.

MR. SHERWOOD: As a matter of practice in the Superior Court in Los Angeles, I am aware of no strict rule which requires the Court in applications for early trial-setting to take account of the fact of pending bankruptcy proceedings.

It is, however, routinely considered as a factor in justifying or not justifying an early setting of a trial date.

THE COURT: All right, thank you very much, sir.

MR. ZIRINSKY: Moreover, your Honor, even if it were true that it would take slightly longer to get to trial in the California Superior Court, it's been held by at least one court, if not more, that it's really immaterial. The Ninth Circuit in the case of Diners Club versus

Bumm, which is reported at 421 F.2d 396, stated that, "The Judge below found that the docket of the Superior Court of Los Angeles County was crowded and that delay would be much greater there than in the Federal court to the prejudice of the trade creditors and certain administrative claimants whose payment must await the determination of Diners' suit. Whether this is so, we cannot say. There is no evidence in the record to support the Judge's conclusion. It is, in any case, immaterial, since we are of opinion that only in most unusual circumstances not here present will the mere fact of delay owing to court congestion be sufficient to overcome the policy expressed in Foust and Texas Mexican against restraining procedures in other courts."

Furthermore, your Honor, in a case, a non-bankruptcy case, the District of Delaware, the case of Jahncke versus OKC Corp., which is reported at 301 F Supp. 866, the Plaintiff in an antitrust action, your Honor, claimed that unless he was given an immediate trial or the matter came to trial quickly, his business would be ruined.

The District Court, in granting a motion to transfer venue on the grounds of forum non conveniens in that case, went on to say that these are imponderables that the courts cannot really consider, that the fact of delay only is not adequate to otherwise control other policy considerations.

Finally, your Honor -- and I will be finished in a moment -- the trustees would have this Court believe that Sulmeyer has instituted this adversary proceeding in this court merely for delay.

Your Honor, we submit that this is an absurd contention. It must be recalled that Esgro is presently emerging from its own Chapter XI case in California. There has been protracted litigation in that case with the Securities and

Exchange Commission over a 328 motion. A plan has finally been confirmed, your Honor, which I'm advised by California counsel for Esgro that there are certain conditions that still must be satisfied before the order of confirmation will become final.

It was a very complicated case, your Honor. Moreover, in terms of the judicial economy and the spirit of economy in bankruptcy cases there, it was felt that because Interstate and White Front and the various other debtors here are involved in Chapter X proceedings, there would be no prejudice to Esgro's estate in delaying and devoting time and attention to other, more pressing matters, because even if there were a successful result, there could be no recovery until there had been a consummation of a plan in the reorganization cases.

So there was no immediate money coming here, and, essentially, your Honor, that explains the delay. Moreover, the trustees cannot really claim that we are delaying. They have delayed almost two years in bringing on an objection to the claim. So I think if delay is going to be used as an argument, both parties must bear the blame for that, if there is any blame to bear.

Moreover, your Honor, if the trustees are so anxious to proceed in this matter, they could easily have done so in California as so ordered by the California bankruptcy court. There was no longer any stay in effect, preventing the trustees from proceeding with their complaint in the California state court. Instead, the trustees delayed for two years in bringing on an objection in this Court, and quite frankly, your Honor, I am somewhat surprised that the trustees brought an action in this court and did not assert a counterclaim. It must be the intentions of the trustees --and it's an irrebuttable assumption until it's explained to my satisfaction -- that they do intend to proceed in California on their claims against Esgro. The same facts are going to be proved in their claim against Esgro as Esgro's claim against the trustees, because the same facts which constitute Esgro's claim constitutes defenses to the claims of the trustees.

Your Honor, it would be wasteful of judicial time and effort to have piecemeal litigation, having the same issues decided before two different courts, having the same issues tried at a substantial burden, expense and waste of judicial time, and for all of those reasons, we believe, in the circumstances of this case, that the stay should be modified.

THE COURT: Off the record.

(Discussion off the record)

MR. CARROLL: Your Honor, I have listened, as you have, to the remarks of counsel and essentially, I think the reasons advanced by the plaintiffs in this case as to why the stay should be lifted boil down to forum non conveniens-typ arguments, that the better forum for adjudicating the claims in this court is California, as opposed to this Court.

There is one overriding and compelling reason, I think, why the claim of Esgro must be adjudicated in this court, and that is, as we will show through evidence, that until that claim is adjudicated, a plan cannot be formulated, and as soon as that claim is adjudicated, a plan will be able to be formulated. This claim is the only thing that is really holding up the formulation of a plan.

The Court in the Foust case made it clear that the overriding consideration of whether or not to lift the stay was the manner in which it would affect the estate, whether it would unjustly affect the estate.

I submit, this is a compelling reason why we should proceed with all expedience in this Court to adjudicate Esgro's claim.

THE COURT: Do the trustees propose

to prosecute their claim in the California Chapter XI?

MR. CARROLL: Not in the California Chapter XI, your Honor. There is a claim pending in the Superior Court in California. This claim is for rent.

THE COURT: I understood that they filed a claim in the Chapter XI: is that correct?

MR. CARROLL: Yes, your Honor.

THE COURT: Do you propose to prosecute that claim? It's a claim for $1,447,000, plus contingencies: correct?

MR. CARROLL: Your Honor, in a point in time we do intend to prosecute the claims that are in existence against Esgro, but those claims are completely --

THE COURT: If you are successful, you will pick up $1.5 million, correct?

MR. CARROLL: No, I don't think we will pick up $1.5 million. We will pick up whatever -- I think it's a ten percent plan out there -- 30 percent plan. I'm not sure exactly of the details. If we prove all our claims out there and we recover 100 cents on the dollar, it would be $1.5 million, yes.

THE COURT: You do propose to prosecute the claim; is that correct?

MR. CARROLL: Your Honor, I'm not sure what the trustees intend to do with that claim now. They don't intend to prosecute it immediately. They think there are more pressing matters to attend to, one of which --

THE COURT: But they can formulate their plan regardless of success or not in the prosecution of their claim in the Esgro XI: is that correct?

MR.CARROLL: Definitely, yes, but not until the Esgro claim in this proceeding is adjudicated. It's a $40 million claim. It constitutes over 17 --

THE COURT: Tell me why it's impossible, as is suggested by the movant, to formulate a plan that would not take into the contingency of either the success or not of Esgro in its claim, really counterclaims, against White Front.

MR. CARROLL: Mr. Crowley, the trustee, will address himself to that when he testifies. Mr. Yassky will --

THE COURT: You are not informed in that phase?

MR. CARROLL: I am informed.

THE COURT: Then tell me.

MR. CARROLL: The reason, as I understand it, is, this is such a huge claim, $40 million; it represents over 50 percent of the disputed claims in this case. It has a direct effect on whether the estate is solvent or not. That's the first reason.

The second reason is, when you have such a huge claim, if you have a 25 percent down-payment plan, that's $10 million, and you would have to reserve for this claim $10 million, which could be used in many other ways if you dispose of this claim initially before you had to formulate your plan.

THE COURT: All right, go on.

MR. CARROLL: I believe, as I said,

that the compelling reason why this claim should be adjudicated here is the effect it has on the plan of reorganization.

THE COURT: What's your estimate of the time it will take to try these claims?

MR. CARROLL: I think the trial could be completed in a week, a week of trial time. Again, subject to your Honor's calendar, it wouldn't have to be a week straight, but I think we would be ready for trial by July 1, if we could go forward with discovery.

We have commenced discovery. We have noticed depositions. I have personally spent numerous hours interviewing prospective witnesses and reviewing extensive files in this case. I am intimately familiar with it. My estimation as to the trial time required to adjudicate the Esgro claim in this case is approximately a week, maybe two weeks. Also, I think there is a very good possibility that a large portion of the claim could be adjudicated summarily prior to trial.

This is a claim for $40 million approximately, of which $24 million is for lost profits.

THE COURT: Suppose Esgro prevailed to some minimal amount, say, $50,000, as apparently was estimated in the California court. How could White Front go on with its claim? Would it not be met with res adjudicata?

MR.CARROLL: No, your Honor, because the issues on White Front --

THE COURT: The issues are not interrelated?

MR. CARROLL: No, your Honor, they are not. White Front's claim is a claim for rent due under leases, rent and money spent for advertising they actually advanced, monies due under a contract.

THE COURT: Esgro says that as a result of, I think we can characterize it, unfair dealing, they would not have incurred the obligation to pay that rent. Is that not a portion of the claim of

Esgro?

MR. CARROLL: No, your Honor, it is not. Their claim is that they were defrauded into opening these departments and because they were defrauded, they lost $24 million and they spent money on fixtures and inventory.

THE COURT: Let's suppose that they prevail on that, though. How could the landlord then come in and say yes, I defrauded you, I caused you to remain on your premises for a period of time, and even though I owe you damages for that, nevertheless, pay me rent?

If I may go back, is this not the position taken by Esgro?

MR. ZIRINSKY: Of course it is, your Honor. The claims arise out of the same transactions, the same agreements, the same background, the same business relationship.

MR. CARROLL: There are completely different facts that underlie both claims.

MR. ZIRINSKY: Also, the matters

asserted in the cross-complaint by Esgro are also asserted to the claims of White Front. I refer your Honor's attention to document number 22 submitted into evidence.

MR. CARROLL: On that point, I would like to refer to the California court proceedings because I think this is --

MR. ZIRINSKY: It's in the binder.

MR. CARROLL: The January, 1974 decision of Judge Kinneson in California, the bankruptcy judge. I think this has been misrepresented here as to what it actually says.

THE COURT: I don't know or really, in a sense, care what the Court said out there. What I am interested in is what the parties said in their pleadings. It seems to me to be an essential factor if in fact these are necessarily compulsory counterclaims. I am at a loss to see how they could be divided up.

MR. CARROLL: They are not compulsory counterclaims. Because the claim of White

Front is a subject of the California proceeding, under Federal Rule 13 that excludes it from the compulsory counterclaim rule.

THE COURT: All right, go on with your argument.

MR. CARROLL: In the California Bankruptcy Court, Judge Kinneson had before him a hearing in which he conceded that he didn't hear all the evidence, but he did have what he called a probable cause hearing.

THE COURT: Well, you see, let's focus on this. I'm told that he for purposes of estimating the deposit held a four-day trial, correct, he didn't resolve the controversy, but solely to estimate the amount of the deposit took him a four-day trial.

MR. CARROLL: He referred to a four-day trial. I don't think that was four full days of trial.

THE COURT: Let's find out, was it a four-day trial, counsel?

Mr. Sherwood?

MR. SHERWOOD: Yes.

MR. HOLTZMAN: Robert Holtzman of Loeb and Loeb.

We were in court for four full days. Approximately two days was spent on the amount of the deposit, approximately two days on matters relating to administrative rent during the periods of time from when Esgro was in Chapter XI. The mini-trial on this subject, then, took about two days.

THE COURT: You will both be heard later to the fullest extent you wish. We have all day.

MR. CARROLL: Judge Kinneson heard evidence on both Esgro's $38 million claim or $35 million, whatever it was, at that time, and White Front's $1.5 million claim. After hearing evidence on both, he really found that White Front's claim was worth half a million dollars. He found that there may be some reason to believe that Esgro did have a setoff, and his primary finding in that regard was that Esgro was not informed as early as they could have been that White Front was going to close its store. He said there is evidence leading to that conclusion and, therefore, there are things Negro may have been able to do to cut down on damages, but it had nothing to do with the $24 million claim on lost profits.

So he didn't find anything on the validity of that claim.

MR. ZIRINSKY: Excuse me, your Honor. I would point the Court's direction to Judge Kinneson's opinion, which is annexed as Exhibit A to the complaint in this adversary proceeding.

MR. CARROLL: Your Honor, there were a lot of things which I disagreed with when counsel was making his opening statement, and I didn't interrupt. I would appreciate not being interrupted myself.

MR. ZIRINSKY: This is a statement of something that is before the Court in a document. I refer the Court to the first paragraph on page 2 of Judge Kinneson's

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opinion, where it says: "The Court believes that the debtor has shown probable cause that the White Front claim is excessive and that the debtor has a substantial counterclaim against White Front. The evidence indicates that the amount of the minimum rental set forth in notice of default of November 20, 1972, should be substantially reduced."

THE COURT: Would you read back counsel for the respondent's remark that immediately preceded?

(The record was read)

MR. CARROLL: I believe a reading of Judge Kinneson's decision will show that he valued a $38 million claim and a $1.5 million claim, based upon preliminary evidence, found that White Front had a valid claim for half a million dollars.

THE COURT: Do you know who testified before him at the mini-trial?

MR. CARROLL: According to my information, it was Mr. Esgro for Esgro, and Mr. Epstein for White Front, and that leaves Mr. Epstein's testimony lasting about half a day at most.

Your Honor, the California action was commenced by White Front in January of 1973, shortly after the announcement was made that the stores were going to be closed.

It was commenced to recover rent, substantial amounts of rent that were due, a substantial amount of out-of-pocket advertising expenses which Esgro, under the agreement, was clearly responsible for. It was also commenced for the purpose of getting Esgro out of the stores because it was not paying the rent. Prior to the announcement that the stores were closing, Esgro's lease had been terminated by White Front because of non-payment of rent.

Purely as a defensive measure, I submit, Esgro asserts a counterclaim for over $30 million. The bulk of that counterclaim is for lost profits. Mr. Esgro, in documents he sent to his shareholders and in other evidence we have, it's clear that Esgro never made a cent of profit on these residential interior departments. In fact, he was losing money hand over fist, and it is obvious from documents that he filed with the SEC and sent to his shareholders that's exactly why he got into the situation he was in, because he was losing so much money on the residential interior departments; yet he files a counterclaim for $24 million for lost profits, a counterclaim which sits for three years, and then Mr. Esgro would have us believe now that he intends to fully litigate that counterclaim, and what brings him to that situation? Because now the trustees here want to litigate the claim and get it out of the way and throw it out because they want to get their plan of reorganization through.

If the trustees had not made an objection to this claim, I submit, it would sit in California for five more years. I understand that in 1975 or

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early 1975 the case was called out in California on a motion by the Court to dismiss it. That didn't prompt Esgro to decide to prosecute its $38 million counterclaim out there. It agreed that the case would be knocked off the calendar. The evidence will show that it's going to take a minimum of a year to get a trial out in California, perhaps a little bit less if the Superior Court out there grants a preference. I don't believe there is any ground to argue to the Superior Court out there that a preference should be granted. Their calendar is in terrible shape out there, I understand, and the evidence will show that. No discovery at all has been conducted in that proceeding. The case is not anywhere near ready for trial. If the Court doesn't grant a preference out there, it's going to take approximately two years before it reaches trial. That means it will be two years before a meaningful plan can be formulated here. If this case is adjudicated, if the claim is adjudicated here within two to three months, as we believe it can be, it is possible that a plan can be formulated very expeditiously. We are on the verge of a plan now. The trustee will testify to that effect, various plans have been considered, and the only thing holding it up is this Esgro claim.

On the burden of proof, I don't believe that the trustees have the burden of proof, your Honor. Under Rule 10-601, the burden of proof is placed on the party seeking continuation of a stay against lien enforcement only. By implication, I submit that that shows that the party seeking the elimination, vacation or the modification of a stay in other circumstances had the burden of going forward, at least has the burden of showing some compelling reason why a stay should be vacated.

There is one case which I would like to call your Honor's attention to which I think is very significant and a very relevant discussion on the situation we have here, which is a case called Michigan Brewing Co. There, there was a claim for fraud brought in the State court, Michigan State court. They attempted to get the Bankruptcy Court stay lifted. The claim was for approximately $35,000. The total amounts of the claims presented in the Bankruptcy Court action were $83,000. So, like here, it was a significant part of the total claims. The District Court stated out there: "It is difficult to see how any plan of reorganization could be properly considered until after Conlon's claim is adjudicated. It is clearly a case in which adjudication of petitioner's claim must be accomplished with all due speed to avoid long postponement of action upon plans of reorganization.

"A denial of the pending petition will enable petitioner's claim to be promptly adjudicated under the direction and control of this Court. Action in the

State court might be long delayed by action or non-action of other defendants."

The Court concluded that, "It appeared to the satisfaction of the Court that petitioner would be denied substantial rights if leave to proceed in the State court were not granted," distinguishing Foust against Munson, and the Court said, "In the instant case, it appears to the Court that to deny a stay of the pending proceedings in the State court would amount in substance to denial of the right of the Corporation, its stockholders and other creditors to the benefits of the provisions of the Bankruptcy Act."

In the instant case, I submit, we have the same situation. Esgro claims its going to be prejudiced by coming to New York.

THE COURT: How long would the trial have taken in that case, what was the substance of the claim?

MR. CARROLL: The substance of the

claim was fraud, violation of the Michigan Blue Sky law.

THE COURT: They estimated the trial time at about how much?

MR. CARROLL: I don't know, your Honor.

THE COURT: Then you can't say it's an identical case to what we have here.

MR.CARROLL: I didn't say it was identical. I said the facts have a substantial similarity to this case. Esgro is claiming prejudice. There are a lot of other people involved here that are going to be prejudiced: the creditors, the stockholders of this company.

THE COURT: Of course, White Front had an opportunity to go on with the litigation of the matter from the time it commenced its suit.

MR. CARROLL: After the stay was lifted, which I don't think it's clear that the stay out there was lifted. We are not asking to go forward with our suit now.

THE COURT: It's a matter of the pot calling the kettle black when there is talk of delay here.

MR. CARROLL: I don't believe it is, your Honor. We are still not asking to proceed with the claim that we have filed in California because we believe the time can be better used by not proceeding on that claim at this time. At best, we can recover, under the plan now, probably ten percent of any amount proven we are going to recover.

So we don't believe that circumstances warrant pressing that claim at this time. We do intend to press it, but not at this time.

THE COURT: But, in effect, the substance is that if you accept the estimation by the Bankruptcy Judge out there, your $1.5 million plus claim is really worth no more than $500,000; is that a fair statement?

MR. CARROLL: That's after considering what he thought that the $38 million claim of Esgro was worth, too.

MR. YASSKY: I don't know if we have it here in that pile of documents. May 18th, an order of confirmation was signed by Judge Lazerow in the Esgro proceeding, and that is a contingent 30 percent plan: ten percent down, ten percent over time, the other ten percent in stock.

So we are only sure about ten percent. So that the 1.7 claim which the Judge on a preliminary basis thought might be half a million dollars, the half a million dollars reduces itself to $50,000 of cash, and you can understand, your Honor, why $50,000 cash is not crucial to the Interstate Chapter X reorganization.

MR. CARROLL: Your Honor, I'm going to conclude in a few minutes. I would like to get on with the testimony.

However, counsel has offered four reasons why the stay should be modified. As I said before, they are really forum non conveniens-type arguments, except for the fact that he says they are entitled to a jury trial in California. Well, they can get a jury trial here, too. The Court has the power to give them a jury trial in its discretion, if it wants to.

THE COURT: Are you aware of a resolution of the Judicial Conference of the United States which says, in effect, if not in substance, that no matter what any law says, no bankruptcy judge shall try a jury case?

MR. CARROLL: No, your Honor, I'm not.

However, there is no right to a jury trial here. They are subject to this Court's jurisdiction. This is an equitable action and there is no right to a jury trial.

THE COURT: But the Foust case says that in certain circumstances, the Court must give consideration to the Constitutional right to a jury trial, of which a party is deprived when he's required to litigate in a bankruptcy court.

MR. CARROLL: Your Honor, Foust didn't turn on the jury trial question.

THE COURT: It didn't turn on it, but it did say it's a very important consideration, did it not?

MR. CARROLL: Well, the language from Foust that counsel quoted was used in the context of an argument that the jury might do something completely unreasonable in this situation, and the Court just went on to say how important the jury trial concept is. But it wasn't used in the context of, you are going to deprive the petitioner there of a jury trial. The decision in Foust didn't at all turn on that. It turned on the question of insurance and the fact that the petitioner may be deprived of a right to go against the insurance company unless he could proceed to judgment in the State court, and every other case that I have seen that involved the lifting or modification of a stay involves a situation where the petitioner or the plaintiff, as the case may be, had a substantial right which was going to be prejudiced by if the stay was not modified or lifted.

THE COURT: That whole subject was much discussed in Katchen v. Landy, so I don't think we have to repeat all of those arguments here.

MR. CARROLL: Yes. What I was getting at, though, in all the cases where a stay was modified or lifted, it was obvious from the facts of the case that the plaintiff or the petitioner in those cases had a very strong interest in proceeding very expeditiously with the prosecution of their claim.

In this case we have no such assurance. If this Court lifts a stay and modifies a stay, we will go out to California and this Court loses all control over the prosecution of the claim. We could go on for another three years out there without any --

THE COURT: That's not true. If at any time it appears that anybody is dawdling out there in California, the trustees can come back here again, assuming that I grant the application to vacate the stay, which I have not yet made up my mind on -- but if I do, this Court does not lose control of the situation.

MR. CARROLL: Well, your Honor, it does lose control over the discovery proceedings. If the Court permits the hearing on the objection to the claim here, it has complete control over discovery. It can set a firm discovery schedule. It can make sure that discovery is completed very expeditiously and then try the case at its earliest convenience. It cannot do that if it goes out to California. The case can drag on for two years unless a preference is granted, and then will take probably a year to try out there. That's assuming that discovery is completed, the parties move forward with discovery out there, and we have no assurance that's going to happen.

THE COURT: I think you can assure me that the trustees will see to it that their attorneys move forward with all due dispatch; correct?

MR. CARROLL: We will try to, your Honor.

THE COURT: I'm sure that the other side can be informed that if they shall delay, then the trustees can always come back in again and ask to have the stay reinstated. So that argument, I think, is just a non-sequitur.

MR. ZIRINSKY: The Court has absolutely the right to condition the modification of its stay, your Honor.

MR. CARROLL: That's just going to lead to more time. I don't think there is any showing that Esgro has any intention of pressing this claim in California. There is no evidence that it has that intention and I don't think any evidence to that effect can be shown at this hearing.

THE COURT: We will see when we

hear from the witnesses.

Do you wish to call a witness?

MR. YASSKY: Professor Crowley, who will be one of our witnesses, will be flying to Ireland later today, and I wonder if I can have some idea of how long Plaintiff's witnesses will take, and perhaps we can arrange the schedule of witnesses.

THE COURT: Off the record.

(Discussion off the record)

THE COURT:Mr. Goodman, you wish to put some remarks on the record?

MR.GOODMAN: I do, your Honor.

I think your Honor will have to sift out a welter of allegations and counter-allegations, but I would like to get to the heart of the point you raised which I think goes to the essence of the complaint to be relieved of the stay.

There was a discussion of Foust v. Munson and one of the guiding considerations the Supreme Court laid down was whether the modification of the stay would work a serious embarrassment to the company's efforts to reorganize itself and to the prospects for reorganization, and if your Honor modifies the stay and permits these suits and claims to go out to California, it will. It may be fatal. If your Honor recalls, we are co-counsel together with White and Case for the senior institutional lenders whose claims are in the principal amount of $65 million, approximately, with accrued interest post the filing of the petition to approximately, to this date, it's another $15 million or $16 million. The claim is roughly $80 million.

Your Honor may not be aware that there is a valid and indefeasible pledge securing that debt granted by the debtor in these proceedings, a pre-petition pledge to the toy line and department store line subsidiaries who operate both the toy and department store line, respectively, and that those lines are the only ongoing income-producing operating companies of Interstate.

Now, if these claims go out to California and if, as I suspect, there will be a considerable period of time before the parties get to trial on the merits, it is probable, highly probable that the senior institutional lenders as secured creditors of Interstate will ask this Court for leave to foreclose the pledge of those companies. We are not going to sit around with a secured position in this estate for two or three years more when the Esgro claim, the fraud claim, the damage claim, the breach of contract claim is being liquidated in a jury trial in the Superior Court of California.

I might remind your Honor that the basic tenor of the Esgro claim is one in fraud, and that Chapter X of the Bankruptcy Act provides that fraud claims are provable, they can be liquidated and estimated in these proceedings and, moreover, the only place they can be paid is in these proceedings in volving

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Interstate and all of its subsidiaries. So there is the jurisdictional power in this Court to determine the merits and amount of damages, if any, that the Esgro people have against Interstate and White Front.

Now, Mr. Zirinsky in his very able presentation made mention of an absence of necessary parties. I do not see that from a close reading of his complaint. I have read it carefully and it puzzled me that he should refer to a non-joinder in that sense, because it wasn't raised in the complaint.

Finally, your Honor --

THE COURT: Even if they are not necessary parties, his argument would have great weight if they were proper parties to avoid multiplicity of litigation, which I think is one of the prime things that he emphasized.

MR. GOODMAN: That may be, your Honor.

If your Honor looks merely at the caption of the proceeding, you will see that it involves the White Front Stores. Interstate is the last-named mentioned defendant. It is the parent holding company, as we are all aware.

Now, the White Front Stores are a discontinued operation, your Honor. I don't know at this moment what in the way of assets that White Front has in California, but the locus of Interstate and White Front today are here in the Southern District in these proceedings, and not out in the Central District of California.

So finally, your Honor, for all of those reasons, and most particularly because of my representation to you on the record that for you to modify the stay and send this claim out to California to be litigated in the State Court jury trial, it may irrevocably and irretrievably wreck the effort to reorganize Interstate.

Thank you, your Honor, for your permission. May I respectfully retire.

THE COURT: You are welcome. Thank

you for your comments.

MS. WIENER: Your Honor, we are also concerned with the economy of administration here and we believe that the centralizing of the administration of this estate is a forerunner of economy of administration. We believe that litigating in a State court action at this time would hamper an expeditious administration of this estate. To date, in the past two years the trustees have expended vast amounts of time and energy litigating the various claims that have been filed. Over 9,000 have been filed. Many have been settled, reduced or expunged as the case may be. It seems rather odd that the largest single claim filed, the claim upon which the very persons who would participate in the plan, the degree to which they would participate, not to mention the very solvency of the estate itself -- that that should take place in a court other than this one where the plan will ultimately come to rest.

It is for those reasons, your Honor, that we believe that the claim of Esgro should be determined in this court, as opposed to the Superior Court of California.

THE COURT: All right, thank you, Ms. Wiener.

MR. GOODMAN: There was one remark I intended to make that I omitted, namely, that Rule 10-103 of the Chapter X Rules would permit the appointment, your Honor, of a Special Master where circumstances require it, to determine in a Chapter X reorganization a lengthy or arduous trial, such as this may or may not be. There seem to be two schools of thought between the reorganization trustees and the claimant. I just meant to point that out to you, that if your Honor was unavailable or your schedule would not permit, that there is the basis in the Chapter X Rules for the appointment of a special master to hear this one matter.

That was my concluding remark.

THE COURT: All right, thank you,

Mr. Goodman.

MR. ZIRINSKY: May I just make one very brief comment to the statements made by Mr. Goodman and by Ms. Wiener.

THE COURT: Yes, please.

Before you do, though, I would like to point out that both of them go on the pre-supposition -- I'm sorry. I will take them separately.

Off the record.

(Discussion off the record)

THE COURT: Mr. Goodman assumes this is going to be a two- or three-year trial. I'm still waiting to hear of what I consider very important facts, the identity of the witnesses, the location of the witnesses. I understand that counsel from both sides in California are here and that we are going to get the benefit of their statements. These, I think, are the critical factors for me to use in evaluating, and I would further point out, there is no inconsistency with the stay being modified rather than vacated. But if you wish to make some comments, go ahead.

MR. ZIRINSKY: I concur, your Honor. Mr. Goodman made one statement, that the Court has power, jurisdiction. No one disputes that this Court does have the power and does have the jurisdiction to determine it.

THE COURT: Because the claim was filed.

MR. ZIRINSKY: Obviously. It's a question of discretion. That's all I wanted to say.

With regard to Ms. Wiener's comments, I would respectfully just state that I think in terms of looking at this claim as holding up the reorganization, it's putting the cart before the horse. I think that because a claim has to be liquidated in order to formulate a plan of reorganization, if that's true, nevertheless that's what the scheme of Chapter X encompasses, the liquidation of claims before a plan is formulated.

The question is whether it should be liquidated here or in California. It still has to be liquidated.

At this time, I would like to call as my first witness and probably only witness Mr. Arthur Sherwood, who is a member of the firm of Gibson, Dunn and Crutcher, in Los Angeles, and who has served as counsel for Esgro and for Mr. Sulmeyer, the reciever, throughout the course of the litigation concerning this dispute.

end of request for "daily copy".

(Continued on following page)

ARTHUR L. SHERWOOD, called as a witness, having been first duly sworn by the Court, was examined and testified as follows:

THE COURT: Be seated, please.

Would you give the reporter your full name, your residence address.

THE WITNESS: Arthur L. Sherwood, 10424 Cheviot Drive, Los Angeles, California.

DIRECT EXAMINATION

BY MR. ZIRINSKY:

Q Would you state your occupation, please?

A I am an attorney at law.

Q Are you admitted to practice in the State of California?

A Yes, I am.

Q How long have you been admitted to practice?

A Approximately eight years.

Q Do you practice law with a firm in California?

A Yes.

Q Would you name the firm, please?

A Gibson, Dunn and Crutcher.

Q Mr. Sherwood, are you familiar with the facts and circumstances surrounding the litigation between the parties, both in California Superior Court and in the Bankruptcy Court for the Central District of California?

A Yes, sir. Gibson Dunn and Crutcher and myself personally were counsel of record to Esgro, Inc., when the Superior Court action began, and I appeared as counsel for the defendants and cross-complainants in that lawsuit. We were also appointed, pursuant to Court order in the Bankruptcy Court in the proceedings in the Central District of California, to act as special counsel to both the debtor and the receiver in the Esgro, Inc., proceedings in connection with the White Front matters.

Q Mr. Sherwood, are you familiar with the pleadings filed by the respective parties in the Superior Court of California?

A Yes, I am.

Q To the best of your ability, could you just briefly summarize to the Court the gist of the claims asserted by each of the parties, both in the complaint and in the cross-complaint.

A The complaint of a number of the White

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Front entities which was filed in the Superior Court is a rather lengthy one. It is broken down into a number of causes of action, separately stated, for approximately 33 different stores, and I believe captioned under four legal theories as such. There is a number of causes of action for possession of premises; causes of action for money due; causes of action for breach of contract, and one additional theory, basically, for money due.

Q Mr. Sherwood, did you prepare and file the answer of Esgro, Inc. to the complaint filed by the White Front companies?

A Yes, I did. The answer of Esgro, Inc., I believe was filed at the same time as the cross-complaint of Esgro, Inc., and one document is incorporated within the other, as I recall. The answer denied a number of the allegations of the complaint of White Front, set forth a number of affirmative defenses. Among the affirmative defenses were the incorporation of the pleadings of the cross-complaint.

Q What is the basis of the complaint set forth by Esgro in its cross-complaint?

A The cross-complaint of Esgro is captioned under, as I recall, three different legal theories.

One is breach of contract. The contention there, in substance and a very abbreviated form, is simply that the parties entered into a contract in connection with the operation of residential interior departments in White Front Stores by Esgro, Inc., that as a part and parcel of that contract, there was an obligation on behalf of White Front to keep these stores open so that the departments could be operated by Esgro, Inc., and that White Front breached that contract agreement.

There is another cause of action for fraud and misrepresentation. That action is founded upon the contention, in essence, that throughout the period of negotiation for the contract permitting -- contemplating the operation of residential interior departments and certainly a period afterwards, White Front had come to the conclusion that it would not continue to operate these stores, and did not disclose that fact to Esgro in a timely fashion or when the determination had been reached that a number of stores would be closed, that as a result, Esgro, Inc., was required to precipitously and inefficiently dispose of inventory and suffered other consequential damages.

The third cause of action, as I recall, was based on a recision theory, incorporating a number of the other concepts which I have just mentioned, and I think also under California law the conclusion that parties are entitled to recision and an accounting, basically putting them back in a status quo position if there was a substantial mistake, either unilateral or mutual.

Q Mr. Sherwood, the matters and the claims set forth in the cross-complaint, would they also constitute defenses to the claims asserted by White Front?

MR. CARROLL: I object. I haven't objected to Mr. Sherwood summarizing the document, but I think when he starts giving conclusions based on the documents, the Court is in a position to do that, and not Mr. Sherwood.

THE COURT: Overruled.

THE WITNESS: I believe they would. That, of course, was the reason why we specifically incorporated as an affirmative defense to the complaint allegations, substantive allegations of the cross-complaint.

BY MR. ZIRINSKY:

Q With regard to a trial of the issues involved in the complaint and in the cross-complaint in the Superior Court of California, do you have any idea or do you have any estimate as to approximately how many witnesses would be required to prove the case on behalf of Esgro?

A I could give an estimate at this time, but I would want to first make a qualification that to some extent, it would depend upon the evidence produced and the witnesses produced by White Front. Under our procedure, since White Front was formally the plaintiff in that proceeding, they would go forward with their case first, and there are a number of potential issues on their claim which, if they didn't raise in some fashion, perhaps would be unnecessary to call witnesses as a defense, and a lot would depend precisely on what kind of a case was put on by White Front, in the first case.

MR. CARROLL: May we have some clarification as to whether the witness's testimony is directed to White Front's case, Esgro's counterclaims or both the entire case of the claims of White Front and counterclaims? I'm not sure if the record is clear on that.

THE COURT: I don't think anything has been said about it, but I assume he's talking about the entire case.

However, if you wish to clarify it, would you please clarify it, Mr. Zirinsky.

BY MR. ZIRINSKY:

Q Mr. Sherwood, are you speaking now with regard to Esgro's proof of its claims against White Front, or are you speaking of both?

A I was going to respond to the question on the understanding that it asked for the trial of the matters raised in the pleadings in the Superior Court action.

THE COURT: No. I think your answer was triggered by the question, what would be the number of witnesses who would have to testify forEsgro, and you then showed that before you could give a considered judgment on that, it would require an evaluation of the witnesses who would be produced by White Front, because under their practice the plaintiff goes first. So I assume you are talking about the entire case, on the assumption that the stay were lifted.

THE WITNESS: That's correct.

THE COURT: So far as you have been able to prepare the case, do you have any notion as to how many witnesses will be called by the plaintiff, or are you yet in such a posture that you can intelligently answer that?

THE WITNESS: Well, I believe that -- I suppose it would be sheer speculation on my part. I know that --

THE COURT: Your best educated guess, approximately how many witnesses is it your opinion you, the defendant-counter-claimant, will be required to call to present your case, if the stay be vacated and who are they?

THE WITNESS: I would say a minimum of ten witnesses and it could go up very greatly from there, depending on how the trial proceeded.

THE COURT: Can you identify them for us and give us their present addresses?

THE WITNESS: I can identify a number of the witnesses, your Honor.

THE COURT: All right.

THE WITNESS: Mr. Francis J. Esgro, who is the principal operating officer of Esgro, Inc. His residence is in the Los Angeles area. That's where his business address is, also.

THE COURT: Who else?

THE WITNESS: Mr. William Coleman, I believe, would also be a witness. He's also an officer of Esgro, Inc. His residence and businesses are also in Los Angeles.

Mr. Howard Fletcher, I believe, would also be a witness. He is an officer of Esgro, Inc.,an employee of Esgro, Inc. His residence and employment address both in the Los Angeles area.

I believe that there may be one or more other witnesses who were former employees of Esgro, Inc., who still are in the Los Angeles area, with respect to accounting issues, and the like.

I believe that if White Front in their case did not call as a witness -- and in any event, we would call on behalf of Esgro a number of former employees or present employees of some of the White Front operations, including Harry Epstein. It's my understanding that he is in the Los Angeles area, or at least on the West Coast.

I believe, also, that issues will be raised as to the operations of the 33 stores during the time the residential interior departments were in operation. That covers approximately a one-year period. I believe, therefore, that would require the calling of witnesses to those operations firsthand, the store managers, perhaps, perhaps both employees of White Front and employees of Esgro, Inc., in those stores.

I would guess that most of those people, since their business and residences at the time were on the West Coast, principally the California area -- that probably a good number of them would still be located in the West Coast, in the California area.

I believe that we would also call as witnesses the independent accounting firm who audited the statements of Esgro, Inc., during that period of time. The accounting was done out of the Los Angeles office of Peat, Marwick, Mitchell and Company and there were at least two partners or employees of Peat, Marwick Mitchell out of the Los Angeles area who were involved in that type of accounting, and at least one of them, I know firsthand, is still in the Los Angeles area.

I believe there are probably quite a number of others.

MR. ZIRINSKY: I think you have named enough, Mr. Sherwood.

BY MR. ZIRINSKY:

Q Mr. Sherwood, you stated that after Esgro filed its Chapter XI petition, your firm was retained pursuant to an order of the California

Bankruptcy Court. Could you please advise the Court as to the circumstances surrounding your retention and your activities as special counsel for Esgro, Inc., and the receiver in connection with thesematters?

A Yes, sir. It was the desire at that time of both the debtor, Esgro, Inc., and the receiver to proceed with the White Front litigation and in particular, to assert the claims that the receiver and Esgro felt they had against Interstate and the White Front entities. It was felt that that could best be done in the Superior Court where the action had been begun by the White Front entities. An application was submitted to the Bankruptcy Court in the Esgro proceedings for permission of the debtor and the receiver to employ Gibson, Dunn and Crutcher and myself as special counsel in connection with the White Front dispute.

There was also another order which was subject to an application and which was entered by the Bankruptcy Court specifically authorizing Esgro, Inc., to proceed with the cross-complaint and claims against Interstate and White Front in the Superior Court of Los Angeles.

THE COURT: This order was made

approximately when, sir?

MR. ZIRINSKY: I have a copy of the order with me.

Q I show you here what appears to be a copy of an order dated July 27, 1973, and ask you if you have ever seen this order before or a copy of the original of that order?

A Yes, I have.

Q Is that the order you have just referred to?

A Yes, it is.

MR. ZIRINSKY: May I have that marked Plaintiff's Exhibit 1 for identification?

MR. CARROLL: No objection.

(Document abovedescribed was marked Plaintiff's Exhibit 1 in evidence.)

BY MR. ZIRINSKY:

Q I also show you an application which is annexed to the order which is now Exhibit 1 in evidence, and ask you whether you have ever seen a copy or an original of that application?

A Yes, I have.

Q Is that the application that was made

in connection or for the order that you just referred to?

A Yes, I believe so.

MR. CARROLL: We have no objection to the application being marked in evidence.

THE COURT: Let's have the record clear, if we may.

The application was marked 1 in evidence. I believe that, for the record, the order, which is the final page of this document, should be marked 1 in evidence and the application, therefore, can be marked 1-A in evidence.

(Order previously described marked Plaintiff's Exhibit 1 in evidence.)

(Application to order previously described marked Plaintiff's Exhibit 1-A in evidence.)

BY MR. ZIRINSKY:

Q Upon entry of the order, Exhibit 1 in evidence, what steps did you take thereafter?

A We proceeded to file the answer as authorized by that order, and the cross-complaint against Interstate and White Front, and from there on there were proceedings on a demurrer on behalf of

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Francis J. Esgro personally. There eventually came in an answer to the cross-complaint on behalf of Interstate and the White Front entities who remained as defendants in that cross-complaint, and discovery was begun by both sides.

At that point in time, as discovery was beginning, as I recall it, we received notice from an attorney in New York that an order -- well, that a filing of Interstate and White Front had been made in chapter proceedings here, and that as a consequence all proceedings against those entities were stayed.

Q Mr. Sherwood, are you familiar with a hearing conducted before Judge Kinneson in the California Bankruptcy Court regarding the proof of claim filed in the Chapter XI? In the Esgro Chapter XI case by White Front Stores, Inc.?

A Yes, I am. I acted as counsel before Judge Kinneson on behalf of the debtor, Esgro, Inc., to try that deposit issue.

Q What was the purpose of the hearing?

A The purpose of the hearing, insofar as my involvement is concerned, was to have the Court determine what deposit, if any, should be required with respect to the White Front claim of approximately $1.5 million. It was the position of Esgro, Inc., in that proceeding basically that that claim was higher than was realistic with respect to the deposit question; that, therefore, Esgro, Inc., should not be put to the financial burden of having to come up with an excessive deposit in order to finance or obtain confirmation of the plan of arrangement.

Q Was evidence adduced at that hearing before Judge Kinneson with regard to the counterclaims asserted by Esgro in its cross-complaint?

A Yes, sir. The total proceedings there took, as I recall, four full days. Technically there were two separate issues before the Judge. One was the deposit question and a second was a question which White Front brought on with respect to what amount, if any, it should be permitted for administrative rent for the alleged use of White Front premises after the beginning of the Chapter proceedings of Esgro, Inc.

The facts involved, and which were adduced in connection with those two issues, I think, substantially overlapped, and I think Judge Kinneson realized that. He referred in his order on the deposit question to four days of trial as pertinent to the issues there and I think, in essence, we had a four-day trial on facts pertinent to the deposit question, some of which were also relevant to the administrative rent question.

Q At the time of this hearing, was it the contemplation of the parties -- withdraw that.

At the time of this hearing, Mr. Sherwood, was the California litigation in Superior Court proceedings?

A It was then pending, yes.

Q Was the California Bankruptcy Court made aware of the fact that the litigation was proceeding in the Superior Court of California?

A It was. I would have to look back to see whether the pleadings were specifically introduced. They may have been introduced as exhibits in that hearing.

MR. ZIRINSKY: May I go off the record for a moment?

MR. CARROLL: I would object to suggesting to the witness --

THE COURT: Stay on the record.

BY MR. ZIRINSKY:

Q To the best of your knowledge, if you do know, is there any reason why the California

Bankruptcy Court did not dispose of the claims on the merits at that time?

A Well, yes. The issues before the Bankruptcy Court on the deposit question were in essence twofold, as it was tried in those four days. One-half of it was with respect to the merits or lack of merits of the claim of White Front for approximately one and a half million dollars, as made in their claim in the Esgro Chapter proceedings.

The other half was the presentation and mini-trial of the merits or lack of merits of the cross-claim or allegations contained therein of Esgro against Interstate and White Front, the purpose of which was, from the standpoint of Esgro, to show that when those claims were both determined in some final action, little, if anything, and likely nothing, would end up being owed by Esgro to White Front and that, therefore, there was no reason to require any substantial deposit.

Q Were there any motions made at that hearing before the California Bankruptcy Court that the Court should dispose of the entire controversy on the merits?

A The Court at the outset, and it was my contemplation that this is what would happen, made it quite clear that it was not in a position from what it knew of the dispute -- could not actually determine the issues in any final form, and I know I approached the trial that way. We spent four days, and it would have taken a great deal more time to make any definitive presentation.

The presentation made was a very cursory one, primarily with testimony from the witnesses, the two principal witnesses from each side, very little, if anything, from subsidiary witnesses, very little, if any, real going-over of documents or particular numbers.

From my standpoint, the examination of the witnesses and the cross-examination was very abbreviated because it was my contemplation, and the Court at that time made it quite clear, that it was the Court's contemplation, that this was a quick look just to get an idea of the probable cause for each of these two aspects of the dispute to determine what should be done, if anything, on the deposit.

Q . Mr. Sherwood, in your estimation, if this case does proceed to trial both on the complaint and on the cross-complaint, what is your best estimate as to how long it would take to have a trial, to complete a trial once trial was commenced?

MR. CARROLL: I would object to the question. I don't think the witness is qualified to give that type of an estimation at this time.

THE COURT: Overruled.

THE WITNESS: My estimate would be an absolute minimum of five weeks. I think the pleadings --

THE COURT: You have answered the question.

BY MR. ZIRINSKY:

Q Mr. Sherwood, have you looked into the question as to how long it would take to obtain a trial date from the Superior Court of California if this matter were to proceed there?

A I'm familiar with procedures of the Master Calendar Department of the Superior Court and the process by which it is possible to obtain an early trial date, yes.

Q What are those procedures that would have to be followed?

A The procedure generally in the Superior

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for obtaining a trial date is that the parties, when a case is at issue, file what is called an at-issue memorandum. Sometime thereafter, in a timely fashion, the Court invites the parties to certify that the case is ready for trial and that eventually leads to the trial-setting conference and a trial date.

There is a procedure where a party, should it wish to do so, may make a motion to the Master Calendar Department of the Superior Court, setting forth reasons why a party feels it's necessary to have an early date for trial than would otherwise be obtained, and that the Court will hear and determine it basically on an evaluation of the reasons and needs for an early trial date.

Q Assuming the worst possible of worlds and that a preference could not be obtained from the Superior Court of California, do you know, under present calendar circumstances or conditions of that Court, what the approximate waiting period is at this point for a trial date?

A I believe it is somewhere in the vicinity of 18 months to two years. That, in a case such as this, would have to be qualified and I guess this also reflects on my prior answer.

In California there is a statute which provides that cases should be set for trial, should commence trial within five years of their beginning and it is the policy of the master calendar department that if there is any danger of going over this five-year period, the case will be specially set so that it fits within the five-year period.

I don't recall the specific date on which the complaint in this matter was filed, but that would be an upper lid, I think, on any setting.

MR. CARROLL: January of '73, your Honor.

THE COURT: January or February.

February 15, wasn't it?

MR. CARROLL: Yes, February 15.

BY MR. ZIRINSKY:

Q In the event the stay is modified by this Court so as to allow the cross-complaint and the complaint to proceed in the California Superior Court, is it your intention to prosecute the action expeditiously on behalf of Esgro?

MR. CARROLL: Your Honor, I object to the question. It's not what Mr. Sherwood's intention is. It's what

Esgro's intention is.

THE COURT: Overruled.

THE WITNESS: Absolutely. I expect to be counsel primarily involved in taking that case to trial.

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It would certainly be my intention -- it is my understanding it is the company's intention to get that matter to trial at this stage in an expeditious fashion. We are treating it as if it were a case where we are the plaintiffs.

MR. ZIRINSKY: One or two further questions, your Honor, and then I will be finished.

BY MR. ZIRINSKY:

Q Mr. Sherwood, during the pendency of the Chapter X cases before this Court, and in or about August of 1975, was there an order to show cause issued in the California Superior Court with regard to this matter which is presently on the calendar?

A Yes, there was.

Q What was the purpose of that order to show cause? What was the reason for it?

A The Master Calendar Department in the Superior Court has a procedure where, if there is inactivity in a filing sense in getting a case to trial, it automatically comes up to the Master Calendar Department and a hearing is set on an order to show cause for a dismissal, to see if the case is still there and if anybody cares about it.

We received that dismissal -- that order to show cause re dismissal. I prepared and filed an affidavit and appeared in connection with that hearing, telling the Court that at that point, a stay was in effect because of the pendency of the Interstate and White Front proceedings and that it was our intention to bring the matter to trial.

Q I show you this and ask you if this is a true copy of the affidavit to which you have just referred?

A Yes, it is. This is my file copy.

MR. ZIRINSKY: Your Honor, I would ask that that be marked Plaintiff's Exhibit 2 for identification.

I ask that it be submitted in evidence at this time. Do you have any objection?

MR. CARROLL: I have no objection.

THE COURT: It's received.

(Affidavit of Mr. Sherwood marked Plaintiff's Exhibit 2 in evidence.)

BY MR. ZIRINSKY:

Q Were any affidavits submitted by other counsel of record in the proceedings before the Superior Court of California?

A Yes.

Q Was an affidavit submitted on behalf of the trustees of White Front, et al?

A Yes. We received service of one. When I initially received the order to show cause, I telephoned Mr. Holtzman, who was with Loeb and Loeb, representing the White Front and Interstate entities, advised him that I was going to file an affidavit of declaration seeking to keep the case active and make sure it wasn't dismissed, and I asked him or at least he indicated that he would do the same on behalf of the other entities? the other parties.

Q Do you know if Mr. Holtzman ever did indeed file an affidavit?

A I received service of one, yes.

Q Is this a copy of the affidavit you

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referred to, the affidavit of Mr. Holtzman?

A Yes. This is my file copy. This is a copy I received.

MR. ZIRINSKY: I would move that to be marked as Plaintiff's Exhibit 3 for identification.

THE COURT: Any objection?

MR. CARROLL: I would like to look at it.

THE COURT: We will take five minutes while you do.

(A recess was taken)

MR. ZIRINSKY: We were just at the stage where we requested the admission into evidence as Plaintiff's Exhibit 3 an affidavit of Robert A. Holtzman filed with the Superior Court of the State of California for the County of Los Angeles.

(Document abovedescribed marked Plaintiff's Exhibit 3 in evidence.)

MR. ZIRINSKY: Your Honor, I would direct the Court's attention to the date of the affidavit submitted into evidence as Plaintiff's Exhibit 3 which is in

Court of Los Angeles.

THE COURT: This order was made

August of 1975. I would also direct the Court's attention to the statement made by Mr. Holtzman with regard to the request by the trustees that the action be maintained on the calendar of the Superior Court of the State of California.

THE COURT: With particular emphasis to paragraph 6 at page 2, I take it?

MR. ZIRINSKY: I believe that's the paragraph, your Honor.

Yes, your Honor.

BY MR. ZIRINSKY:

Q Mr. Sherwood, earlier you testified with regard to the procedures in the Superior Court of California with regard to obtaining a trial preference.

Based on your experience as a practitioner before the California Superior Courts, do you believe that in the circumstances presented here, there would be a good likelihood that the Superior Court would grant a preference?

MR. CARROLL: I object to the question as having no foundation.

THE COURT: Overruled.

THE WITNESS: Based on my understanding

of the situation and especially if able counsel for White Front and Interstate entities made their arguments and presentation about the need for speed, I certainly do think that the Superior Court Master Calendar Department would give us an early trial date.

THE COURT: Do you believe that the application might be fortified by a specific request from this Court that the Master Calendar Department look upon such a motion with favor?

THE WITNESS: I would think it would be very helpful, your Honor.

BY MR. ZIRINSKY:

Q One last question. Mr. Sherwood, the trustees have alleged in their answer to the complaint in this adversary proceeding essentially that the claims of Esgro as asserted in the cross-complaint, as asserted in the proofs of claim filed with this Court are essentially frivolous. In your capacity as counsel for Esgro, Mr. Sherwood, have you made any independent investigation through the process of interviewing witnesses, interviewing parties to ascertain the factual background underlying the disputes and controversies between the parties?

MR. CARROLL: Your Honor, I object to the question.

THE COURT: Overruled.

THE WITNESS: Yes, I have done some of that.

Also, as part of that was my examination of Mr. Epstein and what occurred during the presentation of evidence on that issue, among others, at the deposit hearing in the Bankruptcy Court in Los Angeles.

BY MR. ZIRINSKY:

Q Based on your knowledge of the facts and circumstances and based upon your capacity as an attorney at law admitted to practice in the State of California, is it your belief that there is merit to the claims asserted by Esgro?

MR. CARROLL: Your Honor, I object to the question. I don't believe the witness is qualified to give an opinion as to the merits of a lawsuit.

THE COURT: Overruled.

determine what deposit, if any, should be required with respect to the White Front claim of approximately $1.5 million. It was the position of Esgro, Inc., MR. CARROLL: I would expect that I would have full latitude in cross-examination to go into the basis for his opinion.

THE COURT: Certainly.

THE WITNESS: Yes, I do.

THE COURT: I think it goes without saying, no self-respecting attorney is going to say that he presented a pleading in which he has absolutely no confidence or faith.

MR. ZIRINSKY: Thank you, your Honor.

THE COURT: Off the record.

(Discussion off the record)

MR. ZIRINSKY: I have no further questions.

THE COURT: Do you want to go on with your cross, or do you want a few minutes?

MR. CARROLL: What we would like to do with counsel and the Court's permission is to call Professor Crowley before proceeding with cross-examination.

THE COURT: Is this agreeable?

deposit question to four days of trial as pertinent to the issues there and I think, in essence, we had a

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MR. ZIRINSKY: Yes, it is.

One other point. During the recess I discussed with counsel for the trustees that I was prepared to have Mr. Sherwood testify with regard to the law of California regarding the right to a jury trial.

Counsel for the trustees indicate that they do not contest the issue as to whether or not a jury trial would be granted as a matter of right in this proceeding should the case proceed in California.

Therefore, I will not waste the Court's time.

THE COURT: Is this so?

MR. CARROLL: That the claims, if tried in California, there would be a right to a jury trial in California, if properly demanded, yes.

THE COURT: May I ask you this: Have you estimated in your own mind when your discovery would be completed, if you were permitted to go forward in California?

THE WITNESS: It would depend obviously

on how much cooperation we got among the attorneys and parties conducting such discovery.

THE COURT: Keep in mind, we have trustees in reorganization under the control of this Court and I'm sure that they are not going to do anything but proceed in the best of good faith.

THE WITNESS: I believe that if it were done as expeditiously as possible, it could be completed in something in the order of four months.

THE COURT: And is your firm prepared and manned to give this case a priority over other matters in the office?

THE WITNESS: We have got approximately 150 lawyers in our firm, about 70 of which are in the trial department and, if necessary, we can find people who can spend the time.

MR. CARROLL: I believe I indicated I would like to interrupt the testimony of Mr. Sherwood and call Professor Crowley.

(Witness excused)

JOSEPH R. CROWLEY, the additional trustee herein, called as a witness on his own behalf, after having been first duly sworn by the Court, was examined and testified as follows:

THE COURT: Would you give the reporter your full name, your residence address.

THE WITNESS: Joseph R. Crowley, 27 Maria Lane, Yonkers, New York.

DIRECT EXAMINATION

BY MR. CARROLL:

Q For the record, Professor Crowley, you are the trustee appointed by the Court of Interstate Stores, Inc., in reorganization proceeding number 74 B 614 through 802?

A Yes, sir.

Q You were appointed pursuant to an order of this Court dated June 17, 1974?

A Yes, sir.

Q Professor Crowley, are you familiar with the various claims which have been filed in the proceeding?

A Yes, sir.

Q What is the total amount of claims filed in the proceeding, approximately?

A Approximately $302 million.

MR. ZIRINSKY: May I ask, before we proceed, are these figures going to be consolidated figures based upon all of the debtors, or is this to be merely to Interstate?

MR. YASSKY: All of the debtors.

MR. ZIRINSKY: Is the case consolidated substantively?

THE COURT: No.

BY MR. CARROLL:

Q Have certain amounts of those claims been expunged or reduced by Court order?

A Yes. I would say as of this week, approximately $79 million to $80 million have been either reduced or expunged.

Q So there is a total of how much in outstanding claims right now?

A We started with $302 million. We have approximately $80 million. We would be down to about $222 million, $223 million.

I would say there is another $10 million of claims by mortgagees on stores which are continuing to operate, and we would assume that in the Plan, that those claims would be expunged in that the continuing stores would pay rent on an ongoing basis.

Q In your position as trustee, have you made any attempt to evaluate the claims which are still in existence?

A Yes. It is the position of the trustees that we feel that the ultimate amount of valid claims will be approximately $150 million.

Q That is the amount of the claims presently pending which you feel are valid?

A Yes, sir.

Q So there is approximately what, about $70 million of the disputed claims still pending?

A Yes, sir.

Q How much of that amount is attributable to the Esgro claim?

A I believe the Esgro claim is in the amount of $38.7 million.

Q To date, have you made any attempt to determine whether or not the estate is solvent?

A Sir, the trustees have been internally endeavoring to formulate a plan of reorganization and certainly in the question of the formulation of such a plan, the issue or determination of solvency would be

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a most significant factor.

Q Will you explain why that is?

A Well, if the value of the company is in excess of the amount of the valid claims, then there could be some participation in the plan of the reorganization on the part of the shareholders.

So a determination will have to be made as to whether or not this estate is solvent, and that's the reason we are seeking to have and are pushing right now for an expeditious resolution of the claims.

THE COURT: But even if the Esgro claim were cut, you would still have another approximately $30 million that you would have to litigate; is that not correct?

THE WITNESS: Yes, sir.

BY MR. CARROLL:

Q Professor Crowley, in your opinion, if all of the $222 million worth of claims that are still outstanding are good, would the estate be solvent?

A Well, sir, in our endeavors to make an evaluation, the factors that would go into an evaluation of the company as we have determined in our duties as trustees would be the amount of excess cash, the value of the tax loss carryover and then the determination of the capitalization rate to be used with respect to projected earnings. Depending upon the multiplier that would be used in the latter computation, there could be a basis where perhaps an evaluation of $200 million might render this company solvent.

Q How about $220 million?

THE COURT: In essence, then, you have tentatively found that the valuation in the Chapter X technical sense is approximately $200 million?

THE WITNESS: Your Honor, it would depend -- we do have to have an evaluation. We will need the advice and counsel of an investment house. But I'm talking about the preliminary work done by the trustees in determining what multiplier you would use with respect to projected earnings.

BY MR. CARROLL:

Q Well, in your opinion, if there are $220 million in valid outstanding claims, would the estate be solvent based upon your preliminary work?

MR. ZIRINSKY: Objection.

THE COURT: What's the objection?

MR. ZIRINSKY: Your Honor, I don't

know that Professor Crowley has been qualified as a financial expert to make a determination as to solvency.

MR. CARROLL: My question is based on his preliminary work.

THE COURT: Overruled.

Off the record.

(Discussion off the record.)

THE COURT: The objection is overruled.

MR. ZIRINSKY: Withdrawn.

MR. CARROLL: Do you remember the question, Professor Crowley?

THE WITNESS: No, I do not.

BY MR. CARROLL:

Q In your opinion, based upon your preliminary work done so far, if all of the $220 million in claims that are still outstanding are valid, would the estate be solvent?

A I would not think so, sir. That's again subject to all of the qualifications that were mentioned, as was reiterated by his Honor.

Q In your opinion, based upon your preliminary work, if only $150 million worth of the claims are good, would the estate be solvent?

A In my opinion it would, sir, yes. This is again all subject to the determination of solvency will not be made by the trustees.

It will be made by the Court. But you are asking my opinion.

Q In your work, have you made any attempt to determine what the break-even point of solvency would be?

A Well, not really; I wouldn't want to pick a precise figure, but you mentioned before the figure of $220 million, and I had great reservations about solvency on that figure.

Q You would think at $150 million, the estate may be solvent?

A That would be my opinion, yes.

Q Do you know what the magnitude of Esgro's claim is in relation to the other claims presently pending?

A Counsel, I think I have stated what the amount of the claims have been reduced to, and what the amount of the Esgro claim is, and I think it's rather evident that it's a very significant and substantial sum of money.

Q Well, of the $70 million worth of claims which are still subject to dispute in your opinion, do you know what the largest claim is, other than the Esgro claim?

A Other than Esgro's claim would be, I think, the real estate claims would be next in amounts.

Q Do any of them exceed $30 million, any single claim?

A Not that I know of in a single claim. I was just thinking, I have the figures for the totality of the claims.

THE COURT: In the interests of trying to shortcut it, is it the substance of your testimony, then, that aside from Esgro, you will have to resolve the value of some $32 million of other claims; is that correct, to determine solvency or not?

THE WITNESS: Well, I would think, your Honor, that based on the figures that we have been discussing, we would be more in the position to go to the Court for a determination on the issue of solvency if we had the Esgro claim resolved.

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THE COURT: All right.

BY MR. CARROLL:

Q In the course of carrying out your duties as a trustee, have you attempted to make any preliminary formulation of a proposed plan for reorganization?

A As was mentioned before, the trustees have been working internally with respect to the formulation of the plan, yes.

Q In your opinion, is it possible to structure the plan before the Esgro claim is adjudicated?

A Well, I would say this, that when we talk about the possibility, then I think it's been indicated before that it's always possible to come forward with a plan. The question is whether or not the plan is going to be realistic and have acceptability and feasibility, rather than possibility.

Q Well, in your opinion will it be possible to formulate a feasible or realistic plan without adjudicating the Esgro claim or having an adjudication made of it?

A Without going into the specifics of the internal workings of the trustee, if you are talking about the formulation of the plan, you are talking about perhaps a cash payment to the creditors, you would be talking about some debt structure and perhaps also some equity and that if the corporation is solvent, then there would be some equity available for shareholders.

Now, if you are endeavoring to formulate a plan and in the computation you are dealing with a claim approximating $40 million, then I think you are going to have some difficulty in a realistic approximation of the value of the equity that you would be discussing in a plan. Certainly, if you have that removed, then you can think, deal with a plan that is more acceptable, realistic and feasible.

Q Professor Crowley, do you know where the White Front files relating to its dealings with Esgro are now located?

A It is my understanding and from some utilization that I have made of them, that the White Front files are in our offices at 111 Eighth Avenue, other than what counsel has requested.

Q That's 111 Eighth Avenue in New York City?

A Yes.

Q Have you attempted to review the Esgro-White Front matter in the course of your duties as trustee?

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A I have, sir.

Q And familiarized yourself with the facts?

A I have reviewed the claims and whatever underlying documents there and also the records of our company with respect to it.

Q Do you know whether there are any witnesses who reside in New York who would, in all probability, be called at a trial of the Esgro-White Front matter?

A Yes, sir. I can think of at the moment two.

Q Who would they be?

A That would be Sol Kantor, former Chairman of the Board of Interstate, who was involved in some of these matters, has personal knowledge, and also Walter Craig, who was an officer of White Front and who presently, I understand, is a resident in this area.

Q Are you familiar with the amount of interest that is accruing on the claims at the present time annually?

A Yes, sir. My recollection is that as of approximately February first, 1976, according to our calculations, that on post-petition interest, it would approximate, I believe, $21 million.

Q How fast is that accruing annually, do you have any idea?

A I would say again, just trying to run a calculation through my mind, it would be something close to $1 million a month, just, I think, somewhat under that.

MR. CARROLL: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. ZIRINSKY:

Q Professor Crowley, you have testified that the trustees are in the preliminary stages of formulating a plan in these reorganization cases?

A That was not quite my testimony. I don't believe I used the word "preliminary." I said we were internally preparing a formulation of a plan.

Q At what stage of the proceedings as Chapter X trustees did you and your additional trustee commence formulation or commence thinking about formulation of a plan?

A I would say that again, that the first time we had actually formulated a plan -- I would say sometime last summer. Whether it's June, July or

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August, it's in that area.

Q Professor Crowley, you stated that it would be difficult to structure a plan without a liquidation and resolution of the claims filed by Esgro; is that correct?

A Counsel, you know, I am not pinpointing a particular claim as such, or denominating Esgro. I'm talking about really it's the amount involved that is of concern to me.

Q Would it be impossible to formulate a plan?

A Sir, I believe it is possible, and I have been advised by counsel that it is not necessary to have a resolution of all of the claims before the submission of a plan; that some contingencies can be provided in the plan, so even if the plan is submitted, that you can go on continuing in your work of the resolution of the claim.

So to that extent, yes, it is possible.

But my concern here is that the amount of the unresolved claims at the moment are such that would not permit us to come into court to, I think, get a determination on solvency.

I think the Court would say to us,

"Trustees, go back and do a little bit more work. When you are further down the road with respect to the resolution of the claims, then come in." And I think also, further, that even if solvency were not the issue, it's what I referred to before, that where you are structuring a plan and, say, if, for example, it were a solvent situation and you have to include in the plan the $38.7 million for the claim we are talking about, and then when you come to the equity available to the stockholders -- now, the stockholders, if there is solvency, would have the right to participate. They would have a right to vote on the plan.

Now, the amount of equity that would be available, you know, to them as shareholders, when you are talking about $40 million, I think you are talking about a very substantial sum and I say this whether the claim was Esgro or something else. I'm just talking about the amount.

Q Professor Crowley, with all due respect, however, isn't it possible that a plan can be formulated to take into account the contingency of an additional $38 million in liabilities against the estate?

A I said before, sir, it is possible. But

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we are also talking about in Chapter X, as I understand it, a plan that must be feasible, and I think if we are talking about an acceptability of a plan -- and this is going to be an important thing -- to get the plan accepted, I think the people would have to have some idea really of the value of the equity that they are receiving, and I think when you have this kind of disparity, it makes it extremely difficult to accomplish that task, and our goal has been, you know, throughout this to get this -- this is a company that is ongoing, is successful. I'm not saying during the trustees. We were there. But it's a company that can go forward, and we think it's essential in our responsibilities to get this matter out of the proceedings as quickly as possible.

Q Professor Crowley, when did you as trustee commence your investigation and examination of claims filed against the estates?

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A I was, I think, appointed --

Q June 13.

A I signed the oath on June 14th. I don't know, sir, whether you were aware what was facing the trustees at that point in time.

Q Professor Crowley --

A You are asking me when we did it. I'm giving you a rundown of what we were doing.

Q Professor Crowley, I did not ask you why you took so long to do it. I asked you when you did do it.

MR. CARROLL: I object to that comment.

THE COURT: Overruled.

THE WITNESS: We began the actual -- directing our attention very substantially to claims right after the first of the year, January, 1975.

BY MR. ZIRINSKY:

Q Professor Crowley, was the claim filed by Esgro on file with the trustees?

A I would assume so, sir. I just do not know offhand the date of the filing.

Q The record will speak for itself as to the date the claim was filed.

A It will.

Q Did you instruct your counsel to make objection to the claims filed by Esgro?

MR. CARROLL: Objection, your Honor.

THE COURT: On what grounds?

MR. CARROLL: What he instructed his counsel to do something.

THE COURT: You mean attorney-client privilege?

MR. CARROLL: No. Why is it necessary?

THE COURT: Pardon?

MR. CARROLL: Are we pointing fingers now, rather than determining the merits of this case?

THE COURT: No. I have a lawyer in a legal proceeding making an objection. Would you state the grounds for your objection?

MR. CARROLL: I will state it on attorney-client privilege, then.

THE COURT: Overruled.

When did you first request your attorneys to look into the Esgro claim?

THE WITNESS: I first spoke to the attorneys specifically about Esgro, I would believe, in June or July of 1975.

BY MR. ZIRINSKY:

Q Do you know, sir, when the objection to the claim was filed by your counsel?

A I believe it was filed sometime in the spring. The date, I don't know.

Q Would it refresh your recollection if I said April 9th of this year?

A I would accept that date.

Q Professor Crowley, in light of the substantial nature of the claim filed by Esgro, the substantial amount of the claim, and you have testified that it makes it more difficult to formulate a plan of reorganization, can you explain why an objection to this claim was not interposed at an earlier date?

A I would say this, sir, that I do know in this past year that counsel has been working most assiduously right in this Court in the resolution of claims and they had set up their own timetable and the matters in which they were going to handle it. I had spoken to them. They were conducting investigations into it. I think counsel with respect to the resolution of claims, in my opinion, have worked very assiduously.

Q You have stated that the total claims on file at the outset were approximately $302 million; is that correct?

A No, sir, I wouldn't say at the outset. I

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said, you know, claims have been coming in. I would say the total to date, my recollection is $302 million.

Q I thought you had testified earlier that the present claims today are approximately $223 million?

A No. I said that the total amount of claims filed as of this point is $302 million. Of that sum, they have been reduced by some $79 million, $80 million.

Q So as of today, as reduced or expunged, the claims total approximately $223 million?

A Yes, sir. I just didn't want any misunderstanding.

Q Do you have any idea as to how many claims in the magnitude of the claim of Esgro have been filed against the Interstate debtors, all of the debtors?

A I tell you on my recollection and the way I carry them in my mind, counsel, is, for example, a very large block of claims I regard as real estate claims and the amount filed there was roughly $106 million. I'm just telling you, I know the breakdown I have on the claims. That's pretty much the way I run through them.

Q Do you know whether or not objections

have been interposed to the allowance of the additional surplus of claims of approximately $30 million or $40 million which you said exist which are in addition to the claim of Esgro?

A I would say that, now again, I know objections -- I understand objections have been filed with respect to other concessionaire claims. I know objections have been filed with respect to real estate claims. I do know this, from reading last week, that there is about $10 million real estate claims that we hope to get reduced in the near future, or expunged.

Q So you really don't know what the status of all of the claims is as of today?

A I can give you, sir -- yes, I can give you --

Q Can you give us an estimate?

A I can give you a total, as I said, of the amount of claims filed. The total number of claims that have been sent to attorneys to file objections -- for the purposes of objections, to be resolved, I think the total sent to attorneys approximated $188 million.

Q Have all of the claims been reviewed?

A Of that sum, the attorneys have -- I

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thought you were asking me if I'm familiar with the status of the claims, and I was trying to respond.

Q . . If you will respond to my question, please.

Have all of the claims which the trustee objects to or believes are not valid or exaggerated or excessive -- have objections to all of those claims been interposed as of today?

A I would tell you what our procedure is on that.

Our procedure is that all of the claims that were submitted have been gone over by the internal staff of the trustees at 111 Eighth Avenue. Where we see matters in dispute which our records are not in accord with, then those matters are sent over to the attorneys to file objections thereto.

For me to tell you right now what specific claim out of the 9,000 that have been filed that there are currently objections or have been resolved, I cannot tell you.

I can tell you what the totals are.

THE COURT: I think he simply asks you, do you know whether objections have been filed to all claims which the trustees have so far found to be objectionable?

Is that not the thrust of your question?

MR. ZIRINSKY: Correct.

THE WITNESS: I would say this. My answer to this is, those matters have been sent over to counsel. Whether counsel has in each case filed an objection in every case, I cannot tell you at this time.

BY MR. ZIRINSKY:

Q You stated that the White Front files are presently in New York; is that correct?

A Yes, sir.

The White Front files are in New York because I had occasion to go to them to get some material last summer.

Q What files would these include?

A Well, the files I went to dealt with the Esgro claims.

Q Do you know when these files were transferred to New York?

A No. I had such files available to me last summer.

Q Did you authorize or did you execute an amended proof of claim to be filed on behalf of the trustees in the Esgro Chapter XI case on or about April 29, 1976?

A I believe I did that very recently.

Q Is it your intention, Professor Crowley, to pursue the claim in the Esgro Chapter XI proceedings?

A Well, certainly at this point, as trustee, I would take every step to preserve the rights of the estate. I have discussed this situation with counsel as to what our proper course or possible course may be in the future.

Q You have testified that there is accrued or post-petition interest has accrued on claims in the amount of approximately $21 million; is that correct?

A That is a computation.

Q What types of claims are you referring to?

A Primarily, it would be the institutional lenders.

Q Are those secured claims?

A Well, that is a matter in issue, sir.

Q Does Interstate and its various affiliates have excess cash on hand today?

A I would use the term, "excess cash" --

Q Cash that is not necessary, cash that is available --

A I would say this --

Q -- cash that is available for investment in short-term paper and various other term interest-bearing obligations?

A Yes, sir.

Q Can you tell the Court please, how much, approximately, how much money that is as of today?

A Our cash to date is approximately $56 million, $57 million.

Q Is that money earning interest today?

A Yes, sir. As I recall, the rates on the CD's have gone down substantially in the past.

Q But the money is earning interest?

A Some interest, yes.

Q The senior bank claims, what is the interest rate on those claims?

A Well, pursuant to the loan agreement it's something over prime.

Q So it fluctuates with the fluctuation in prime rates?

A Yes.

Q As would the rate of return on certificates of deposit, for example; is that correct?

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A Well, yes. It would fluctuate. I don't know whether the proportion would be the same.

Q But they would fluctuate with general prevailing interest rates; is that correct?

A Yes.

MR. ZIRINSKY: May I have one moment, your Honor?

THE COURT: Certainly.

MR. ZIRINSKY: I have a couple of additional questions.

BY MR. ZIRINSKY:

Q Professor Crowley, are the debtors' estates, the operations of the trustees, however you want to characterize it, presently operating at profitable levels on aggregate basis?

A Yes, sir.

Q When was the end of the last fiscal year?

A 2/1/76.

Q What were the annual earnings for that year, do you know?

A Earnings?

Q Yes.

A In profits?

Q Profits.

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A About $19.45 million.

Q $19.45 million?

A Yes.

Q What about for the preceding fiscal year?

A The preceding fiscal year would be, I think as adjusted, came out to about $13 million.

Q Was it ever your intention or was it ever your belief as trustee in these cases, that you would be in a position to file a plan of reorganization by this time?

A Yes, sir.

I had hoped to have filed it. In the beginning, I had hoped that a plan would have been filed at this time, yes.

Q How about in December of 1975?

A In December of '75, I was still shooting to get a plan in this summer, yes.

Q Did you think that there was a reasonable likelihood it could be filed within six months in December?

A Yes. The problem was getting the claims down to a size that we could have a reasonable fix on them, so that we could go into Court and have the proper determinations made.

MR. ZIRINSKY: I would ask the Court to take judicial notice of the transcript of the hearing held before the Court on December 3, 1975. It was a hearing to modify a stay in another matter -- it was in the Interstate cases, but I believe it was Transit Casualty. There were certain statements made on the record by counsel for the trustees at that time, which is December of '75, approximately six months ago, and I read from page 8 of the transcript, your Honor, where Mr. Yassky stated that, "We would hope within the next six months --"

THE COURT: What's the objection?

[illegible] CARROLL: If we are going to take judicial notice, can we take judicial notice of the entire transit proceeding?

THE COURT: Off the record.

(Discussion off the record)

MR. ZIRINSKY: Mr. Yassky, at page 8: "We would hope within the next six months to have a plan before this Court unless there is unanticipated, unexpected objections from different interests.

"The Court: And there will be a relatively lengthy period of time before the Plan will be in a position to be confirmed and I don't see why this matter should remain in status quo when at least we could have had the advantage of one year furtherance toward a resolution of all the matters that are embraced in the State court action."

Your Honor, I conclude my cross-examination of Professor Crowley.

THE COURT: Any redirect?

MR. YASSKY: Not more than five minutes.

THE COURT: Off the record.

(Discussion off the record.)

REDIRECT EXAMINATION

BY MR. YASSKY:

Q You have testified that to date in this proceeding, claims have been reduced or expunged by an aggregate of approximately $80 million?

A Yes.

Q To the best of your recollection, were there several thousand claims involved in those reductions?

A Oh, yes, sir.

Q You have also testified earlier that if the debtors' estates were solvent, then post-petition interest would accrue at approximately $10 million a year, or something close to $1 million a month?

A Something less than that.

Q Has your counsel advised you that if the debtors' estate were solvent, all claims then would be entitled to post-petition interest, just not claims that may be secured or the value of the security would exceed the value of the claim?

A Yes, sir.

Q And then if the claims in this estate were in the neighborhood of $150 million, I believe is what you testified to earlier is a rough approximation of what the trustees believe are the valid claims, you would be taking about interest accruing on that full amount?

A Yes.

Q I think you testified earlier as to the so-called excess cash that might be inthe debtors' estate being in the neighborhood of $50 million?

A Yes, sir.

Q The $50 million --

MR. ZIRINSKY: Objection. Counsel is leading the witness. This is not cross-examination.

THE COURT: He's recapitulating that which is consistent with the testimony, so no harm is done.

BY MR. YASSKY:

Q Earlier in your testimony, Professor Crowley, when the subject being discussed by you was the feasibility or workability of coming up with a plan with the $40 million claim still up in the air, as it were -- do you recall your testimony?

A I do, sir.

Q In the internal plans that have been formulated by the trustees, have the trustees come to preliminary conclusions as to the possible necessity of an equity distribution to creditors -- if I may restate the question.

Have the trustees decided that it may be necessary to give equity or some equity as part of the distribution?

A I mentioned before, in the formulation of the plan we were considering cash payment together with a debt structure and equity to the creditors.

Q Is the reason for that being that if the claims in this proceeding were no less than $150 million it would not be feasible to give a plan of all cash and then debt for the remainder, that that would not be a feasible plan?

MR. ZIRINSKY: Objection, your Honor.

Your Honor, I believe counsel is going beyond the stage of recapitulation.

THE COURT: Yes, far beyond.

Can I ask this question of the trustee.

THE WITNESS: I would just sum up that we thought that an equity position in the plan would be in the best interests of the corporation.

BY MR. YASSKY:

Q If a plan were formulated that still had a $40 million contingent claim outstanding and part of the distribution to creditors at that time were a form of equity, in your view would it be possible to reasonably value the equity at that time when there was a $40 million claim that was still outstanding?

A I believe I testified before under questioning by Mr. Carroll where you had that matter of $40 million difference with respect to the claim, that it certainly would have an effect on the value of the equity and would make it very difficult to place valuations, true valuations on it.

Q If common stock were distributed to creditors as part of a plan, Professor Crowley, and at a subsequent point a $40 million claim were expunged, would that not increase the equity of the corporation?

A I would think so, sir.

Q Wouldn't that substantially affect the value of the stock?

MR. ZIRINSKY: Objection, your Honor.

THE COURT: On what ground?

THE WITNESS: I don't think so.

MR. ZIRINSKY: It's leading the witness.

THE COURT: Well, it's just stating things that are axiomatic.

MR. ZIRINSKY: I would like Professor Crowley's testimony.

THE COURT: I don't think we have to

do this by testimony.

THE WITNESS: Really, I believe I thought I covered that point in my original testimony, Mr. Yassky.

MR. YASSKY: Very good, Professor Crowley. That's all.

MR. ZIRINSKY: Just two questions.

RECROSS-EXAMINATION

BY MR. ZIRINSKY:

Q You are talking about, or counsel was just examining you, with regard to if the stock were issued and then it turned out that Esgro had a $40 million claim, would it affect the value of the stock?

Professor Crowley, assuming the trustees were in a position to file a plan today, what is your best estimate as to how long it would take before there would be any distribution to creditors under that plan?

A Well, sir, at this point, I am going down a road in Chapter X as a first-time traveler. I know that after you submit a plan to the Court, it then goes to the Commission and the Commission has to file their important recommendations and I understand that takes 60, 90 days, hopefully.

So when I said last December I hoped to

have a plan in by June, and I'm certainly working and striving to get one as quickly as possible, similarly it is my understanding that when you submit a plan, it's very difficult to fix any timetable, but certainly, I think in response and to give you the answer, it would be a matter of months, certainly after a plan is submitted, before there could be any consummation.

Q Could it be possibly as much as a year or longer?

A Well, again, sir, if you say possible, I suppose anything is possible, but I think reasonably -- I don't think it would take that long.

MR. ZIRINSKY: I have no further questions.

THE COURT: Anything else?

(No response)

(Witness excused)

THE COURT: 2:15 p.m.

(A luncheon recess was taken)

AFTERNOON SESSION

(2:15 p.m.)

THE COURT: We will resume with the cross-examination of Mr. Sherwood.

MR. ZIRINSKY: That is correct.

THE COURT: Rather, commence the cross-examination of Mr. Sherwood.

ARTHUR L. SHERWOOD, recalled as a witness, having been previously duly sworn, was examined further and testified as follows:

THE COURT: All right, sir, be seated, please.

Would you give the reporter your full name, your residence address.

MR. ZIRINSKY: The witness has been sworn.

THE WITNESS: Arthur L. Sherwood. My residence address is 10424 Cheviot Drive,Los Angeles, California.

CROSS-EXAMINATION

BY MR. CARROLL:

Q Mr. Sherwood, I believe you testified that you have been in practice for eight years?

A Approximately, yes, sir.

Q So you would have graduated from law school what time, in what year?

A 1968.

Q How long have you been with the firm of Gibson, Dunn and Crutcher?

A I officially started with Gibson, Dunn and Crutcher in about May of 1968, and after taking the bar examination, I took a leave of absence for about nine months to act as an instructor at the UCLA Law School. Subject to that one leave of absence, I have been with Gibson, Dunn and Crutcher ever since.

Q When did you come back to Gibson, Dunn and Crutcher after your nine months' leave of absence, do you recall the month and year?

A It was at the conclusion of the next school year, 1969, somewhere around June.

Q How long has Gibson, Dunn and Crutcher been representing Frank Esgro or Esgro, Inc., if you know?

A I'm not sure of the exact date. It goes back several years prior to the Chapter proceedings. It has been in particular matters. It began, I believe, in reference, in representing the company in some labor matters and developed from there to representing the company in a number of different litigation matters.

Q Let me be more specific. When did Gibson, Dunn and Crutcher first start to represent Esgro in connection with its dealings or litigation with White Front Stores?

A Do you mean with respect to the dispute that is involved here?

Q If they ever did in connection with the negotiations of license agreements or the dispute that's involved here, yes.

A I don't think, although I'm not certain, that Gibson, Dunn and Crutcher was involved in any of the negotiations which culminated in the licensing agreements. We may have been involved, for instance, in some of the labor problems with employees in the White Front locations, and things of that sort, or particular litigation problems. My recollection is, we first became involved in the dispute with White Front that we are concerned with here, to my understanding, right about the time and maybe a few days before the White Front Stores were closed.

Q That would have been sometime in late November, early December, 1972, then? Is that correct?

A Roughly, I think that's right.

Q When did you personally become involved in the Esgro-White Front matters?

A I personally became involved at about the time the Superior Court action was filed.

Q That would have been February of 1973?

A Right about that time. It may have been slightly before, but it was -- I was involved virtually as soon as the complaint was filed and served.

Q So you were not personally involved in any of the transactions that gave rise to the complaint or the counterclaim filed by Esgro in the Superior Court action?

A That's correct.

Q So that your testimony this morning as to your opinion of the merits was based entirely upon your conversations with others and not personal knowledge of the transactions; is that correct?

A It was based on conversations with others, looking at documents which I understand to be operative, listening to testimony given at the last hearing, things of that sort.

Q Is it not true that the cross-complaint of Esgro in the California Superior Court action and the claim in this proceeding alleges that there was a failure to disclose the fact that the stores were going to close, the White Front stores were going to close in 1970 when the license agreement was negotiated?

A My recollection is, that allegation is contained in the cross-complaint on information and belief.

Q In the course of your investigation upon which you formed your opinion this morning, what facts did you turn up, or what facts were you told in support of that allegation?

THE COURT: Are you able to really answer that?

THE WITNESS: I cannot answer it fully. I think I can --

THE COURT: Answer it as best you can, then.

THE WITNESS: There are some facts which I think are provable which could lead to that inference. It is my understanding, for instance, that one of the problems that Esgro, Inc., had during the nine months to a year it was actually in and operating in residential interior departments, that period of time, the White Front Stores, to my knowledge, were not kept up as well as they had been in the past. They were not stocked with new merchandise as well as they had been in the past. The foot traffic in those stores was not at a level it had been in the past. I think one of the inferences which might be drawn from those objective facts would be that there was some sort of decision to phase out White Front's operations or perhaps dispose of them in some fashion.

I might add that we have not obviously gotten into a good deal of discovery which would be intended to get at the underlying facts on that allegation.

BY MR. CARROLL:

Q It is true, is it not, that the White Front residential interior departments, the White Front Stores operated by Esgro, the first one was not opened until July, 1971?

A I think it would be approximately in that time period.

Q Most of them were not opened until

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September or October of that year?

A My recollection is that they were operating something in the vicinity of nine months to a year prior to the closing.

Q If that is the fact, then the factors which you gave which you claim would lead to the inference that the decision had been made to close the store would only go back to July of 1971 and not to December, and prior to December of 1970, the time the license agreement was entered into; is that correct?

A I don't know. It would push it back to some period prior to the operation there. I don't know and I don't recall specifically when this change in the operation was noticeable.

During the period prior to the time that Esgro, Inc., was operating residential interior departments, I think in virtually all of the stores, as I recall it, Esgro, Inc., was operating other departments, so it had firsthand contact with the stores themselves, the operations and had some knowledge or experience in the kinds of operations that were being conducted, and I dont know exactly when in time this difference in operation was first noticed.

Q You were informed about this alleged

change in operation by whom, sir?

THE COURT: Are we going to go into now a mini-mini-trial of the claim, counselor?

MR. CARROLL: The witness was permitted to testify as to his opinion of the merits of the case, and I think I have a right to examine what his opinion is based upon.

THE COURT: I simply made an inquiry. Your answer is in the affirmative?

MR. CARROLL: Briefly.

THE COURT: Continue.

MR. CARROLL: Briefly.

THE WITNESS: What was the question?

BY MR. CARROLL:

Q You do not have personal knowledge of any change in the operation of the White Front Stores, do you?

A No, not as such. I may have been in a White Front Store during that period. But I certainly wouldn't have the background personally to make the observations.

Q My question was, who told you that there was some change in the operation?

MR. ZIRINSKY: Objection, your Honor.

Your Honor, I believe that counsel on cross-examination is going beyond the scope of direct examination.

THE COURT: No. On cross, counsel stated very briefly and succinctly and I made an observation that any lawyer worth his salt is going to state that when he makes a claim, either directly or by counterclaim, he believes it has merit. He was permitted to make that statement.

Counsel says he's going to "briefly" test whether this attorney really has faith in the claim that is asserted by way of counterclaim.

MR. ZIRINSKY: I have no objection. My objection doesn't speak to that point. My objection speaks to the point that counsel may be delving into subject matters which may be protected or privileged.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: The objection is overruled.

THE WITNESS: I was going to say --

THE COURT: It's all in the broad area of judicial discretion in testing where the case shall be tried.

THE WITNESS: It was basically from conversations that I had with representatives of Esgro, Inc. I would be a little concerned about getting into too much of the substance because of attorney-client privilege, and the conversations were in the context of my representing the company in connection with the lawsuit here.

BY MR. CARROLL:

Q Maybe we can wrap it up this way.

You had no personal knowledge, did you, of the transactions upon which the complaint by White Front and the cross-complaint by Esgro in California were based?

THE COURT: That's repetitious.

It's been abundantly established, he doesn't.

Q Is it true that all of your information in that regard upon which you based your opinion this morning came from Mr. Esgro or people associated with

Esgro, Inc.?

THE COURT: He has also answered that and he said yes, plus documentation. He has already been asked and answered that question.

BY MR. CARROLL:

Q Have you interviewed any other witnesses than Esgro employees?

A Well, there was testimony from Mr. Epstein at the hearing.

Q But you didn't interview Mr. Epstein?

A I don't specifically recall exactly what that testimony was, but it may have been that some of that testimony dealt on those issues.

Q Have you interviewed Mr. Wood?

A My recollection is that I did not.

Q Do you know who Mr. Wood is?

A He is an individual who is -- well, I'm not sure exactly of his capacity at this point.

Q Do you know whether Mr. Wood was in charge of the residential interior departments for Esgro at one point?

A He may have been.

Q Have you ever seen a breakdown of the

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damage claim asserted in the proof of claim herein and the cross-complaint in the California action?

A Yes, sir.

Q It's approximately $36 million, $38 million?

A Yes, sir.

Q Do you know what portion of that is a claim for lost profits?

A My recollection is that the breakdown includes approximately -- well, somewhere --

Q Let me show you a document. Maybe it will refresh your recollection.

THE COURT: First it will be marked as Defendant's Exhibit A for identifiction.

(Analysis of damages marked Defendant's Exhibit A for identification.)

BY MR. CARROLL:

Q Do you recognize that document, Mr. Sherwood?

A Yes, sir.

Q Does that help you as to how much of the claim is based upon lost profits?

A Looking at this, yes. I can tell you how

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it was broken down, based on these numbers.

Q Well, approximately how much of the total claim is predicated upon a claim for lost profits?

A As I read this, approximately $24 million out of approximately $34 million.

Q There is an additional $5 million more for punitive damages. I'm not sure it's reflected on this schedule.

A That's not included in this. This covers the $24 million for projected lost profits, $10 million for other actual damages and the bottom line, $34 million, did not include, as I read this and as I recall it, anything for punitive damages.

Q Have you ever seen operating results of the residential interior departments in the White Front Stores?

A Yes, sir.

Q Actual operating results?

A Yes, sir.

Q Do you recall what the approximate monthly sales were?

A I would be guessing at this point.

Q Do you recall whether any of those

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operating results showed a profit?

A I would be guessing, but I doubt it.

Q You doubt it?

A I doubt it.

Q You were testifying this morning about the mini-hearing that was held out in the Bankruptcy Court in San Bernardino.

You testified that, to the best of your recollection, there were four days in the hearing on the administrative rent and the hearing on the deposit were intertwined all four days?

A Yes, sir.

Q Have you reviewed the transcript?

A Intertwined in the sense that the issues and the facts were relevant to both in most instances.

Q Wasn't the hearing actually broken down into two parts, one part on the administrative rent and one part on the deposit, the amount of the deposit?

A My recollection is that it was broken down to some extent that way. My recollection was that there was an understanding that -- well, if I could back up to explain and start over.

The principal area of dispute, as I recall it, on the administrative rent claim was on the issue of "selling space" which was a term used in these license agreements, and on which the rental number was based. The rental number was a number which was pertinent to both an evaluation of the White Front claims for deposit purposes and to the administrative rent claim or at least, it was made relevant to the latter by White Front's contentions.

The bulk of the testimony and fact presentation on the issue of what selling space meant and how much selling space there was in the particular stores came in a technical sense, I think, primarily in connection with the administrative rent issue, but it is my recollection that it was agreed or assumed at the time that that would -- those facts and that testimony would apply as well to the deposit question.

So that's the area of overlap that I referred to.

Q Other than that area of overlap, is it not true that it was broken down two days for the administrative rent claim and two days for the deposit issue?

A I don't recall the specific breakdown. I know it was at least two days on the deposit issue and I know the bulk of the testimony and evidence on the administrative rent issue was on the issue of selling space.

Q You testified this morning that I believe you estimated a minimum of ten witnesses would be required at a trial.

You mentioned Mr. Esgro, Mr. Coleman and Howard Fletcher. Who is Mr. Fletcher?

A Mr. Fletcher, in effect, I believe operates as a controller of the company. His background is accounting.

Q Do you know whether he was employed by Esgro in 1972?

A 1972, I believe so.

Q Do you know when --

A His connection with Esgro dates way back. His first contact with Esgro, Inc., was as an accountant with Peat, Marwick, Mitchell, and he went from Peat, Marwick, Mitchell -- and his participation in there was in connection with the audit of Esgro, Inc. -- to Esgro, Inc. So he would have gone back in his capacity either as an accountant for Peat, Marwick, Mitchell or Esgro, Inc., well prior to 1972.

Q You thought members of the accounting firm would be called?

A Yes.

Q I was wondering what issue their testimony would be required on?

A Oh, I think that a good part of the case, in terms of the issues brought up in the cross-complaint, would be proof of damages, and Ithink there are a good number of accounting issues involved there in terms of the amount that the White Front problem had on Esgro, Inc., as an entity; also potential accounting issues as to exactly what the out-of-pocket loss was, what the immediate financial impact was of the closing of the stores, the liquidation of the inventory.

Q So mainly on the damage question?

A Mainly. I mean, I haven't really sat down to plot out every fact that I think they would be involved in, but I think that would account for the bulk of it.

Q Exhibit 1 is the July 27, 1973, order of the California Bankruptcy Court. That order doesn't lift any stay against White Front from proceeding with their Superior Court action, does it?

MR. ZIRINSKY: I would object. The order speaks for itself as to whether it

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authorized and what it did and regardless of whether the order expressly provides for a modification of the stay or not, based upon that order, it was the clear understanding that --

THE COURT: I thought it was permission to the debtor and debtor-in-possession to prosecute the counterclaim.

MR. ZIRINSKY: Also to defend the action.

THE COURT: And to defend the action, the action itself not being stayed by any judicial process automatic or otherwise, because the Chapter XI proceeding was not filed until May, '74.

MR. ZIRINSKY: No.

MR. CARROLL: The Chapter XI proceeding was filed in April of '73 by Esgro.

#4 MR. ZIRINSKY: In April, '73, the Esgro Chapter XI proceeding was filed.

THE COURT: All right.

MR. ZIRINSKY: This is an order entered by the Esgro court which in substance, your Honor, provided for the retention of Gibson, Dunn and Crutcher to defend the action.

MR. CARROLL: Counsel objected on the grounds that the document speaks for itself. Now he's telling us what the document says.

THE COURT: May I see the document?

(Document handed to Court)

Is it your point that White Front was precluded from going forward because of the stay?

MR. CARROLL: My point is that an order was never entered lifting the stay against White Front from proceeding with that action.

THE COURT: If somebody wanted to permit White Front to proceed with White Front's action, who would make it?

MR. CARROLL: Of course, White Front would. But it's been claimed here that there was no obstacle to proceeding with it.

THE COURT: There was never an obstacle to their proceeding, namely, the stay, but the point being made, I believe, was they did not take any action to ask to have the stay vacated.

MR. CARROLL: Correct, they did not, your Honor.

THE COURT: Let's go on, gentlemen.

MR. CARROLL: Nor did Esgro take any action here to have the stay lifted until now.

BY MR. CARROLL:

Q Mr. Sherwood, the cross-complaint was filed in July of 1973 in the California Supreme Court action?

A I would have to look at it to get the exact date, but I think it's approximately then.

Q What else did your firm do in connection with the defense of that action, or the prosecution of the action of the cross-complaint?

A Well, at the same time an answer was filed to the complaint. A demurrer was filed on behalf of Mr. Esgro, a demurrer hearing was held. Eventually an answer was filed on behalf of Mr. Esgro. My recollection is, we also noticed from depositions and noticed a document production. We had some discussions with opposing counsel, I think Mr. Holtzman or another

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member of his firm, about the document production. We also had at least a preliminary understanding of what documents would be produced and they were identified by Mr. Holtzman.

Q Did you ever examine documents?

A I didn't personally, no.

Q Did anybody in your firm examine documents produced by Mr. Holtzman's firm?

A My recollection is that just as we were then at the stage of taking those depositions or at that time, the Chapter XI proceedings for Interstate and White Front were filed and we never received notice of them.

Q When did you notice your depositions, do you recall, at the time you answered the complaint?

A I don't think it was concurrently, but I think it was sometime fairly shortly thereafter.

Q You didn't take any depositions then, actually, did you?

A No.

Q You didn't answer the interrogatories that were served by Mr. Holtzman's office?

A No, sir. That was left with an open extension of time to respond.

Q Getting back to the witnesses you think would be required at a trial, it is true, is it not, that one of the issues, one of the primary issues involved in the counterclaim is when the decision was made to close the White Front Stores? I just say, "one of the issues."

A That is probably a principal issue on one of the three causes of action. On the other two, I don't think that's really an issue, necessarily.

Q So wouldn't the directors of Interstate be relevant on that question as to when the decision was made?

A To some extent as would be the directors of White Front, yes.

Q Do you know who the directors of Interstate were at the time?

A I think I know some of the names. I am not sure I know all of them.

Q Mr. Kantor?

A I believe he was one, but I don't know. I don't have firsthand knowledge.

Q Do you know if Mr. Chapin was?

A To my recollection, he probably was.

Q You testified with respect to your

familiarity with the procedures of the master calendar in, I take it, the Superior Court in Los Angeles?

A Yes, sir.

Q You said generally, I believe, an at issue memorandum is filed; is that the procedure?

A In the ordinary course, once the case is at issue, either party can file an at-issue memorandum. The filing of that memorandum sets the case on a time sequence list and when its time comes up, that progresses it along to the next step in obtaining a trial date.

Q What is the next step?

A The next step in terms of getting a trial date, the Superior Court sends out a notice to each of the parties, saying that you are now eligible to file what's called a Certificate of Readiness.

Q How long is it between those two certificates, the at-issue memorandum and the notice that you can file a certificate of readiness?

A It varies from time to time, and it depends upon the issues in the complaint. Under the California Code of Civil Procedure there aresome kinds of cases that are entitled to priority on the trial calendar.

Q Is this such a case, the White Front-Esgro case?

A I don't remember. The causes of action for possession of the premises may entitle it to priority. I really don't recall.

Q That's no longer in issue, though, is it?

A I don't think so, but I have not seen any waiver.

Q Esgro is no longer in the stores, are they?

A Not to my knowledge.

Q They have given up possession, have they not, of the White Front stores?

A I don't think they have possession of any of the stores.

Q Well, in the normal course, assuming there is no preference on the case, how long would it take between the at-issue memorandum and the certificate of readiness?

A That first varies from time to time, depending on just how crowded the Court is and how fast they get cases to trial and disposed of and how many cases are filed.

Q Say at this time.

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A I think now it probably runs somewhere between, roughly, a year and three months to a year and six months, something in that range.

Q Is the Superior Court still sending out th notices for Certificate of Readiness, inviting the filing of a Certificate of Readiness?

A That is the general procedure.

Q Is there not a moratorium on that because of the crowded calendar of the Superior Court?

A From time to time they suspend doing that.

Q Isn't there one in effect now?

A I don't know today whether there is right now. I mean, there has been from time to time in the past, yes.

Q You are aware of no such order that's been entered or signed in the recent past?

A I don't know one way or the other.

THE COURT: So far as you know, is there one in effect, Mr. Carroll?

MR. CARROLL: Yes, there is, as far as I know.

THE COURT: This isn't a cat-and-mouse game.

MR. CARROLL: I'm asking the witness

if he is aware of this.

THE COURT: Why ask the witness. Why not tell counsel that there is one in effect and ask him to stipulate that for the record.

We have a limited period of time. On a motion to vacate a stay, you are going at it as though this were a trial on the merits.

Do you accept counsel's recommendation that there is a "moratorium" on issuances of Certificates of Readiness by the master calendar department of the Superior Court?

MR.ZIRINSKY: If counsel would tell me --

THE COURT: If he so represents, you are not going to dispute it subject to check.

MR. ZIRINSKY: Precisely.

THE COURT: See if we can't expedite this a bit, Mr.Carroll.

MR. CARROLL: I will try to.

BY MR. CARROLL:

Q You testified about the procedure for

obtaining a preference, making a motion for a preference.

A Yes.

Q That's up to the discretion of the Court out there, whether or not they grant a preference?

A Yes.

Q If a preference is granted, what would that do, permit you to file a certificate of readiness?

A Well, it depends upon what trial date is justified.

If, for instance, there is justification for a trial date within a 12-week period, I believe that it is the practice of the master calendear department on that kind of a situation to go through the process of actually setting the trial date. It depends upon what time period is desired to be said or discussed to be set for the trial.

Q The five year statute referred to this morning under the California law, wouldn't the effect of that be stayed because of the stay that was in effect in that case by reason of the bankruptcy actions?

A If a stay continued and the five-year statute ran, I think that would be found to be justification for not bringing it to trial within five years, yes.

If the stay is lifted, however, I think that we would still be in a position to avoid any undue prejudice from the five-year period passing while the stay was not in effect. A Court would consider that in setting the four- to five-year period.

MR. CARROLL: No further questions at this time.

THE COURT: Anything else?

MR. ZIRINSKY: Prior to closing of Plaintiff's case, I merely would like to submit into evidence the bound volume of documents which your Honor has on the bench pursuant to the stipulation submitted to your Honor between counsel for the parties.

THE COURT: I had understood that was to be deemed to be before me as a result of what was stated at the beginning of the case.

MR. CARROLL: Subject to our checking it.

MR. ZIRINSKY: I just want to make sure it is clear this is being submitted

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into evidence.

Plaintiff rests its case.

MS. WIENER: May I ask the witness a few questions?

THE COURT: Certainly.

EXAMINATION BY MS. WIENER:

Q You stated earlier that it would be a five-week trial, in your opinion, should this matter be heard in the Superior Court of California; is that correct?

A As a minimum, yes.

Q Of that five-week period, how would you apportion it in terms of the claim of White Front, in terms of the claim of Esgro?

In other words, how much time would Esgro need to prosecute its claim?

A As I envision a trial like that --

THE COURT: Off the record.

(Discussion off the record)

THE WITNESS: In other words, if we were just trying the cross-claim and ignoring the claim of White Front?

THE COURT: Yes.

THE WITNESS: If that were the

only claim tried, four weeks. The bulk of the time would still have to be spent. There is a great deal of overlap in the issues. So I think if you tried just the cross-claim, it would take almost the five weeks.

If you tried just the White Front claim, it would take almost the five weeks, because there is so much evidence you would have to present in connection with each separately.

BY MS. WIENER:

Q How about just the liability of Esgro?

THE COURT: Off the record.

(Discussion off the record)

Q How about the question of the liability as opposed to the question of damages?

A On the cross-complaint?

Q Yes.

A It's difficult to make an estimate like that. If I had to, it would be something like two weeks. I just don't know. The problem in making an estimate like that is a lot would depend upon the amount of the discovery between now and the time of trial.

Q No discovery in that action has taken place to date; is that correct?

A No formal discovery as such. There has been some testimony from each side, for instance, at that hearing on the deposit question.

Q You also testified earlier, I believe, that it was your intention to proceed as expeditiously as possible in the Superior Court, should the stay be modified.

A Yes, ma'am.

Q Has Esgro ever communicated that fact to you or are you speaking now of your intention, as opposed to that of your client?

A He has communicated that to me, also.

THE COURT: Can you summarize the substance of the cross-claims by Triumph Sales Co. and Francis Esgro, individually, against the plaintiffs?

THE WITNESS: My recollection is that Francis Esgro was not a cross-complainant.

THE COURT: Who is the cross-complainant?

THE WITNESS: I know Esgro, Inc. is, and I would have to look at the cross-complaint to refresh my recollection.

MR. CARROLL: To save time, I believe Triumph Sales Co.'s cross-complaint is based upon the liquor departments, which is not at issue in the proof of claim that is under question here. It's a subject of another proof of claim, Triumph Sales.

MR. ZIRINSKY: I would bring your attention to document 23 in the binder, which is a copy of Esgro's complaint in the California lawsuit, and would set forth who the parties to the cross-complaint are in the caption.

THE COURT: Esgro, Francis J. and John Doe, 1 through John Doe, 100, and 101 through 400.

All right, thank you very much, sir.

(The witness was excused)

THE COURT: That's the end of the plaintiffs' case.

Do you wish a few minutes, or are you prepared to go on now?

MR. CARROLL: I am prepared to go on now.

THE COURT: All right, do so, please.

MR. CARROLL: I would like at this time to make a motion to dismiss the complaint. I don't think the plaintiff has shown any compelling reason, which I think they are obligated to, as to why the stay should be modified.

THE COURT: Motion denied.

MR. CARROLL: Mr. Holtzman, please.

ROBERT ARTHUR HOLTZMAN,

called as a witness, having been first duly sworn by the Court, was examined and testified as follows:

THE COURT: If you will be seated, please,and give the reporter your full name, your residence address.

THE WITNESS: Robert Arthur Holtzman, 17219 Hallsted Street, North Ridge, California.

MR.ZIRINSKY: Would the Court have any objection if Mr. Sherwood joined me up at the counsel table?

THE COURT: I have no objection at all.

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DIRECT EXAMINATION

BY MR. CARROLL:

Q Mr. Holtzman, what is your occupation?

A I am an attorney at law, member of the California Bar.

Q How long have you been a member of the California Bar?

A I was admitted in absentia in March, 1955 while a member of the Army.

I began active practice in October, 1956.

Q Are you associated with a firm?

A Yes, I am.

Q What firm is that?

A Loeb and Loeb.

Q Are you a partner in that firm?

A I am.

Q How long have you been a partner in that firm?

A Since January, 1966.

Q How long have you been with Loeb and Loeb?

A Since October 1, 1956.

Q What type of a practice do you have, what type of a practice do you engage in?

A The firm engages in a general civil

practice which is generally business-oriented. Within that frame work, my responsibility in matters of litigation and in potential litigation.

Q Has this been true since 1956?

A Yes, it has.

Q Are you familiar with the calendar practice in the Superior Court in Los Angeles County?

A Yes, I am.

Q Would you explain to the Court what the procedure is for getting a case to trial in that court?

A Well, basically I'm talking in terms of an ordinary civil action.

The action of course is commenced by a practice of pleading, complaints, answers, cross-complaints and answers thereto. When that process is completed, counsel desiring to press the matter ahead from that point forward will file what is called an at-issue memorandum. The filing of that memorandum with the Clerk of the Court places the case on what is technically called the ready list and which actually is some sort of a computer process that we are not precisely aware of.

Q May I interrupt you for a moment.

That at-issue memorandum can be filed

before any discovery is conducted?

A Yes, that is correct.

Q Was such an at-issue memorandum filed in the White Front-Esgro matter?

A Yes, it was.

Q Continue, please.

A When the at-issue memorandum is filed, the case takes its place in line with all other cases similarly situated and moves up on the list of cases until it reaches the top.

At that point, the Clerk of the Court automatically sends out a notice of eligibility to file a Certificate of Readiness. In response to that notice of eligibility, any counsel with notice to other technical details may file what is called a certificate of readiness, in effect representing to the Court that, subject to the matters reserved in the certificate, the case is ready to come on for trial.

Q May I interrupt again.

In the normal course, how long a period would be involved between the at-issue memorandum and the certificate of readiness?

A In recent time, it has varied anywhere from 15 to 18 months, 15 months being about the norm, occasionally dragging a little bit behind that.

May I go ahead?

Q Yes, please.

A When the Certificate of Readiness is received by the Clerk of the Court, he, in turn, sets the matter down for what we call a trial-setting conference, and that conference may be scheduled to be held anywhere from 45 to 60 days after the certificate of readiness is received.

At the trial-setting conference, a trial date is set and a mandatory settlement conference date as well, and the case then comes on for trial in what we call our master calendar department, along with anywhere with 25 to 100 other cases, and the date set for trial.

Q How long in the normal course would be involved between the filing of a certificate of readiness and the trial, the time it comes up for trial to the first time on the trial calendar?

A As I said from the Certificate of Readiness from the filing of the certificate of readiness to a trial-setting conference --

THE COURT: You said 45 to 60 days.

THE WITNESS: You are running about 45

to 60 days.

From the trial-setting conference to the trial date, ideally, it is supposed to be not more than 60 days. In recent experience, it's been about 90 days.

BY MR. CARROLL:

Q Is there any variation from that normal procedure at the present time, that you are aware of?

A Yes, there is.

Q Would you explain what variations there are?

A In recent time -- and by this, I mean as recently as the month of April, 1976 -- the master calendar department has been unable to accommodate cases set for trial when they come on for trial and as a consequence, cases have been continued by the Court on its own motion as they reported for trial in rather wholesale fashion.

What in effect has happened is that the presiding judge has been required to order all cases coming on for trial for the first time -- again I'm talking about civil cases -- before the master calendar department to be continued. For example, in April they were continued to around July, simply due to the unavailability of trial departments.

As a second example of what has happened recently, there is, according to my understanding, presently a moratorium in effect in that no notices of eligibility to file certificates of readiness are being sent out at all. The reason for this, I understand, is that the criminal docket is so heavily crowded that the available judges are being used for that, and until the docket becomes less crowded on the criminal side, the presiding judge will not permit further civil cases to be set.

Q Is it possible to shorten the period you have referred to by making a motion for a preference?

A You can move the presiding Judge for an earlier trial-setting or to advance the case on the calendar. We don't call it a motion for a preference but, rather, a motion to advance. I think the effect is the same.

Q Assuming that no motion to advance is made in the Esgro-Interstate case and it was determined to press the case for trial at this point, would we start at the statement of readiness or at the memorandum of issue stage?

A It's my understanding that if no special motion were made, we would start the process of filing an at-issue memorandum and move ahead from there.

THE COURT: I thought this has already been done in this case.

I thought you said that the at-issue memorandum has already been filed in this case.

THE WITNESS: That is correct, your Honor.

THE COURT: So you are in the computer and you are now waiting for your notice of eligibility to file a certificate of readiness; is that correct?

THE WITNESS: If I may explain.

THE COURT: Surely, if you will, please.

THE WITNESS: The notice of eligibility to file a certificate of readiness was received. A further notice was received. Neither Mr. Sherwood nor myself felt ourselves in a position to file the certificate of readiness, as a consequence of which the Court brought the case on a motion to dismiss on its own motion.

We had a hearing on that.

THE COURT: You are thrown back to your pre-at-issue memorandum, in effect; is that what you are saying?

THE WITNESS: That is my understanding, your Honor. That is correct.

BY MR. CARROLL:

Q You would have to begin the 15- to 18-month period again?

A As I understand it, yes. Obviously subject to whatever motions we may want to address to the Court.

Q The motions to advance, in your experience what factors would the Court take into consideration?

#5 A Well, the Court, in my experience, has taken into consideration a vast number of considerations. Probably paramount among these would be the possibility or probability of serious prejudice to any party should the case not be advanced.

A typical example of this is where a critical witness or a party is in danger of dying or is required to leave the country or something of this sort.

THE COURT: How about a substantial

reorganization pending in New York which is waiting breathlessly for the resolution of the decision of a claim which is many millions of dollars at stake?

We don't know, obviously.

THE WITNESS: I have had no experience on this one. Certainly the presiding judge would take any factors we reasonably want to place before him into consideration. Other factors obviously would include the state of readiness of the case, whether discovery remains to be done or has been completed, the condition of the Court's calendar, obviously, and the other cases equally compelling the Court's attention.

BY MR. CARROLL:

Q Would he consider whether the claims asserted in the case could be tried somewhere else?

A I suppose that it is possible. I really don't know. I would certainly lay that before the presiding judge and hope to appeal to his discretion as appropriate.

Q In your opinion, Mr. Holtzman, based

based upon your knowledge of the calendar practice, what is the minimum amount of time that would elapse between now if the preparations for the trial were to be done and the time it was actually tried in the Superior Court?

A Bearing in mind that we are talking about something addressed to the very broad discretion of the presiding judge, I would say that the greatest probability is that the case could be brought on for trial in about eightmonths. I doubt very much in the present condition of the Court's calendar that this case could be brought on any more quickly than that, although I must concede that it is possible.

But then again, anything is possible.

THE COURT: Are you assuming a preference being granted?

THE WITNESS: I'm assuming a motion being made and granted, that is right.

THE COURT: All right. I just wanted the record to be clear on that.

BY MR. CARROLL:

Q Mr. Holtzman, you heard Mr. Sherwood testify about the witnesses that he thought would be necessary at the trial. How long did you represent

White Front prior to the filing of the Interstate proceeding?

A Well, our firm represented the corporation at the time of its formation, some time back in the late 30's or early 30's, I understand, and I believe represented Harry Blackman before that. I personally became involved in the representation of White Front in various matters of litigation fairly shortly after I joined the firm.

Q Did you participate in any of the transactions, meetings involved in the White Front complaint and the Esgro counterclaim in the California proceeding?

A I was present at some meetings and some telephone discussions that did involve the subject matter, yes.

Q Were you involved in representing White Front vis-a-vis Esgro during the period 1970 through 1972 in some matters or others?

A I don't recall being involved in any matters involving Esgro prior to approximately February of 1972.

Q February of '72?

A Yes. My involvement has been pretty much continuous from that point until the commencement of these proceedings.

Q Based upon your knowledge of the facts, do you have an opinion as to the counterclaim asserted by Esgro?

A Yes, I do have an opinion.

Q Before I ask you what your opinion is, let me ask you this.

Before you filed the complaint in February of 1973, in the Superior Court, did you consider the possibility of Mr. Esgro filing a counterclaim?

A Yes, I did.

The counterclaim had been threatened and I certainly did consider that.

Q Let me ask you what your opinion is of the counterclaim.

A Without meaning to contradict Mr. Sherwood, for whom I have the greatest respect, I feel and have felt that the counterclaim, subject to the uncertainty which is inherent in all contested litigation, is without substantial merit, both on its merits and with respect to any possible proof of damage.

Q Getting back to the question of the

witnesses, you were representing White Front in connection with Esgro matters in December of 1972 when the announcement was made to close certain White Front stores, were you not?

A Yes, I was.

Q Do you know by whom the decision was made?

A From my understanding, the decision was made by the Board of Directors of Interstate Stores, Inc., for the parent corporation and for its subsidiaries.

Q Do you know where the corporation's office was located?

A Yes, I do.

Q Where was that?

A My understanding is, at 111 West -- 111 Eigh Avenue, isn't it? It's in New York City, in any event.

Q Would the Board of Directors of Interstate -- would some of them be required as witnesses on the question of when the decision was made to close the stores?

A Yes, I believe so.

MR. CARROLL: No further questions, your Honor.

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CROSS-EXAMINATION

BY MR. ZIRINSKY:

Q Mr. Holtzman, do you represent the trustees in reorganization in these Chapter X cases?

A I understand that arrangements are in the process of being made whereby we would be engaged to represent the trustees in this case, should the matter proceed in California. We do presently serve as special counsel to the trustees in other matters.

Q At the time the Chapter XI and Chapter X petitions were filed, were you acting as counsel for White Front and Interstate in this matter in California?

A Yes, sir.

Q Was there any reason that you know of as to why the firm of Shea, Gould, general counsel to the trustees, took it upon themselves to purportedly intimately acquaint themselves with the facts of the dispute?

A I would only presume that as counsel for the trustees, they felt it their obligation to do so. Frankly, I think they would be remiss in their obligation if they did not.

Q Were there any discussions at that time prior to the commencement of this adversary proceeding that's the subject of this hearing today -- were there discussions at that time as to whether or not the case should proceed in California or should proceed here in New York?

A Yes, I believe so. I recall some discussion of that subject.

Q What were the considerations taken into account in reaching a decision to try and litigate the case here in New York?

A Well, there are many considerations. The ones that are foremost in my mind are the necessity of bringing the matter on for early hearing, length of trial, availability of the records, availability of witnesses. We discussed the people who, in our estimation, would testify, who remain in California and those who remain in New York. We discussed the condition of the California court's calendar. We discussed the -- those are the primary ones that occur to me.

I'm sure if I thought about it, I could think of others.

Q In your opinion, assuming this case went to trial, proceeded to trial, how long would it take to try this case?

A In California?

Q I don't see how it makes any difference whether it's tried in California --

THE COURT: No. He asked, in California.

MR. YASSKY: Can I ask for a clarifying statement.

When we refer to this case, are we referring simply to the proof of claim --

THE COURT: The entire case.

MR. YASSKY: Is that the question?

THE COURT: If it wasn't, it is now, and then we will break it down, as was done by Mr. Carroll.

Off the record.

(Discussion off the record)

THE COURT: Do you want a few minutes?

THE WITNESS: No. I have the thing in my mind.

THE COURT: You were asked in California. Your response, Mr. Zirinsky?

MR. ZIRINSKY: Yes, in California.

THE WITNESS: As I understand the

question, which calls for my statement of the length of time it would take to try the complaint and the cross-complaint in California before the Superior Court and to a jury, I would say probably somewhere around six and eight weeks of trial time.

BY MR. ZIRINSKY:

Q What if the only issues to be tried or the only issues to be tried in the California court related to the issues raised by the cross-complaint? Would that change your estimate?

A It becomes very hard to say, because, as Mr. Sherwood testified, there are issues which are quite interwoven, as, for example, the issue of selling space, which goes both to the complaint and the answer thereto, and to the cross-complaint and answer thereto, to some extent.

The complaint as such -- my case in chief on the complaint should be very brief.

Indeed, it might even be stipulated to or handled by requests for admissions, similar types of discovery, and I don't think I would take more than one day to put on my case in chief. After that, I'm really speculating as to what defenses -- what I would have to put in on his as a consequence of that, whatever may develop.

Q Mr. Holtzman, it is the practice in the California Superior Court that once a trial has commenced in a case, it is continued from day to day until completed absent any extraordinary circumstances requiring an adjournment?

A Normally, yes.

Q So that once the case did reach trial, it would be tried until conclusion, absent some exception happenstance that might result in a delay during the middle of a trial?

A Yes.

Q Which is not likely to occur; it's an imponderable; is that a fair statement, it's an unknown?

A It's unknown. We do, of course, have bifurcated trials on occasion.

Q I am speaking as to the general practice ofthe Superior Court.

A The general practice is, you start and go day to day, weekends and holidays excluded, until the trial is over.

Q Did you recommend that the matters in dispute proceed in New York or proceed in California?

A Let's say that I participated in and acquiesced in the formulation of the decision.

Q When you say "acquiesced in," does that mean that independent of the joint decision, independent of the trustees' determination, you had a differing view of your own?

A No. I felt and I indicated that it was in the interests of the estate that the matter be tried here.

Q That the matter be tried here?

A Yes. In other words, it was a consensus and my opinion formed part of that consensus.

Q Do you believe that it would be inconvenient for the case to be tried in California? Forgetting the allegations that have been made that it will interfere with the formulation of a plan. I am talking just in terms of this particular trial on these particular claims. Would it be inconvenient for the case to be tried in California?

A It would be inconvenient, I think, to a fairly significant extent.

Q For what reason?

A Well, number one, the records are here.

THE COURT: Can you give us some idea of the bulk of the records? By that I mean, are there carloads? Are there file cabinets, suitcases, or attache cases?

Off the record.

(Discussion off the record)

THE COURT: Or do you know?

THE WITNESS: I would say a filing cabinet, perhaps a couple of them. I doubt there would be much more than that.

BY MR. ZIRINSKY:

Q Who are the directors of Interstate?

A I cannot name them all. It was my understanding at the time of my last acquaintance Mr. Kantor was Chairman of the Board and, of course, a director. I seem to recall that Monroe Chapin was a director. Beyond that, I really don't know.

Q To the best of your knowledge, did Mr. Kantor or Mr. Chapin -- were they personally involved in negotiations with Esgro in connection with the license agreements?

A I have heard some reference to involvement on Mr. Kantor's part.

Q Where did you hear that from?

A Mr. Esgro, if I recall correctly. I really can't speak to Mr. Chapin's involvement one way or the other.

As I mentioned, these people in my mind would be called by me as a witness, not because of any involvement in negotiations but because, to my understanding, they are among those who made the decision that is being challenged in the fraud counts of the cross-complaint.

I have not finished answering your question concerning why I think the trial in California would be inconvenient at this point.

I think I was interrupted in my answer. Do you wish me to complete it?

Q Yes, please continue.

A In addition to the documents, and, of course, in addition to the difficulty of dealing with a client across the country, to my way of thinking there are a number of witnesses whom I would expect to call in connection with the case in chief in opposition to the cross-complaint.

We have mentioned Mr. Chapin and Mr. [illegible] as members of the Board of Directors. Walter Craig [illegible] also been mentioned and, to my thinking, he's a critical witness. He's the person, to my understanding, who is most active in the gathering and organizing of information which ultimately led to the decision and was a direct participant in the making of the decision.

Q Where does Mr. Craig reside?

A I believe he resides in Connecticut.

In addition to that, there may be other directors, although their testimony would probably be cumulative.

I also understand that critical to the decision was the participation and acquiescence of the group that we have referred to as the banks, the institutional lenders to Interstate and to its subsidiaries, whose acquiescence in a major decision such as closing a number of stores was essential, and I would expect to be putting on testimony as to when they were consulted and what manner they were consulted, when they arrived at their decision, where, when and how it was communicated, and it is at least my understanding that the principal representatives of the syndicate of institutional lenders are also in the New York area.

I can't name names specifically. I refer

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to them simply as the banks or the lenders.

This group of witnesses, the directors, Mr. Craig, who is no longer employed, the banks -- these are all witnesses whom I could not control, and I either have to come here and take their depositions and put on their testimony by way of depositions, or seek to induce them to come out to California for a trial.

But I couldn't compel them to come out.

Q How many witnesses do you believe you would be required to call in defense of the cross-complaint, Mr. Holtzman?

A I could visualize somewhere between seven and ten, perhaps 12 witnesses, somewhere in that area. Again, we are talking about response to testimony being put in by the other side. There could be considerably more if we get into a store-by-store situation. I doubt it could be many less.

Q Are you saying, Mr. Holtzman, is it your testimony that, to your personal knowledge, these individuals, the directors, the banks -- you are saying that these people would be essential to your defense of the action if you proceed in California?

A You are asking me how I would organize and present the testimony in a case that I expect that I might have to try.

I haven't interviewed every one of these people. I really haven't formulated my plan. I'm not even sure what evidence they're going to put in for the other side.

Q How can you speculate that you are going from the directors to, I believe, former directors, to the banks, the institutional lenders? Who else would be required, Mr. Holtzman?

A Perhaps the accountants. I don't know.

Q Where are the accountants?

A Leidesdorf has offices both in Los Angeles and New York, and served Interstate in both locations.

At this point, I can only look to the pleadings and to the brief discussions between opposing counsel and myself concerning the expected course of the case.

Based upon the fact that I have got to respond to a conspiracy charge, a charge of conspiracy allegedly commencing as early as 1970 and continuing for two years thereafter, and based upon my knowledge of the actual events as communicated to me by my clients and disclosed by the documents, these are the witnesses that I am thinking about at the present time.

Q But you are speculating at the present time; isn't that a fair statement?

A I'm trying to develop in my mind the course of action that I would take.

Q You haven't developed a course of action?

A I have thought about it.

Q Have you developed it, or are you speculating?

A It's in a state of development.

Q I would appreciate a non-lawyer's answer. Are you speculating, or are you saying this is whatyou have drawn out and defined as your course of action?

A I'm giving you my trial plan as it presently exists in my mind.

MR. CARROLL: Objection.

THE COURT: Overruled.

Q Would it also be part of your trial plan that the claims asserted in the White Front complaint would be part and parcel of a litigation involving the cross-complaint?

A To an extent, I would say yes, but only to a limited extent.

Q The defenses asserted by Esgro and the

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other defendants to the claims asserted by White Front in its complaint, is it not true that they entail substantially the same facts that would be relevant and material to proof of the cross-complaint?

A Well, there is a pleaded affirmative defense which, by its terms, incorporated by reference the entire cross-complaint.

Whether and to what extent the matters set forth in the entire cross-complaint constitute a defense to an action for rent which is what I have pleaded in essence is uncertain. I would certainly attempt to argue and brief to the Court the concept that such matters do not constitute a defense to an action for rent against a tenant who occupied the premises and enjoyed the benefits of the occupancy.

Q But you are not sure?

A I am an advocate. I would advocate the position. I would certainly recognize Mr. Sherwood would have an argument to the contrary.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Let's take five minutes.

(A recess was taken)

Q Mr. Holtzman, have you been directed by

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the trustees to take any action whatsoever with regard to the claims asserted against Esgro in the California lawsuit in the complaint?

A I have not been directed to take any judicial action, if that's what you mean by your question. I have certainly assisted [illegible]ing available documentation and copies of the plea[illegible]d of course being here today.

Q You appeared on behalf of White Front at the hearing, the so-called hearing before Judge Kinneson in the Bankruptcy Court in Los Angeles: is that correct?

A Yes. The hearing was actually conducted in San Bernardino, about 90 miles away; but yes, I did appear and participate in that proceeding.

Q Was Judge Kinneson aware at that time that there was an action pending in the Superior Court of California?

A I'm confident that he was.

Q Subsequent to the filing of the cross-complaint in the California lawsuit and prior to the White Front and Interstate bankruptcy proceedings, did the California litigation proceed? This is subsequent to the Chapter XI petition by Esgro.

A Yes, to an extent.

Q To an extent.

What do you mean by "to an extent?"

A It proceeded to this extent. Simultaneously with the filing of the answer and cross-complaint, Frank Esgro individually demurred to the complaint on the grounds that it didn't state a cause of action.

As to him, we had a hearing on that demurrer and the demurrer was overruled and an answer was filed.

I filed a fairly voluminous set of interrogatories, which is, I believe, presently here today, and there were no further proceedings with respect to that, other than extensions of time.

Q Why not?

A Well, Mr. Sherwood asked for, first, if I recall, a specific extension of time to respond and then an open extension and he and I discussed the matter at some length and it was his feeling, communicated to me, to which I responded, that it didn't make a heck of a lot of sense to press the action on either side at that time, certainly.

Certainly from our point of view, with the future of the Esgro insolvency proceedings in

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great doubt, we might very well be litigating toward a judgment that we could put on the wall that would be totally uncollectable.

Q Did you deem that White Front was stayed by virtue of the Chapter XI proceedings in California from continuing with the lawsuit?

A It was my understanding that White Front was stayed. From the time the Esgro Chapter XI proceedings were filed then and the stay order issued in connection therewith, it was a specific stay order, up until the time that Mr. Sherwood obtained leave to file his answering cross-complaint.

After that, I didn't deem any stay to be in effect.

Q Your testimony would contract the statement made by counsel for the trustees earlier during the trial?

MR. CARROLL: I made no such statement. I just stated there was no order specifically lifting the stay. There is nothing contradictory.

THE WITNESS: Is there an answer to the question on the record?

THE COURT: Yes, I believe that you

have stated it.

Q The answer is, you did not deem yourself stayed; is that correct?

A My answer is, I did not deem myself stayed, once the order was issued authorizing Mr. Sherwood to proceed.

THE COURT: If he could proceed, you could proceed?

THE WITNESS: That was my understanding.

MR. ZIRINSKY: Off the record.

(Discussion off the record)

BY MR. ZIRINSKY:

Q Do you know who Harry Epstein is?

A Yes, I do.

Q Would you please tell the Court who he is?

A Harry Epstein is a gentleman who was for a number of years a high-ranking executive officer of White Front Stores, Inc. I believe that at various times, he held the corporate office of Vice-President and perhaps even briefly Executive Vice President and he was one of the gentlemen who served as operating head of the White Front chain and for a period of time and at other times occupied an administrative position

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dealing with, let's call it, financial affairs, as distinguished from merchandising affairs.

Q Did he occupy this so-called high executive position with White Front during the period, say, from 1970 through 1973?

A Yes, he did.

Q Is he presently employed by White Front or by any of the other debtors, or by the trustees, to the best of your knowledge?

A To my knowledge, no.

Q Do you know where Mr. Epstein resides?

A Yes, I do.

Q Where?

A In the San Fernando Valley, a suburb of Los Angeles.

Q Do you know who Mr. Ron Wood is?

A Yes, I do. I have met him.

Q Would you please tell the Court who he is?

A Mr. Wood is a gentleman who, for a period of time, was employed by Esgro, Inc., as, I believe, both a corporate officer and a director and who headed up various of the merchandising arms of Esgro, Inc., particularly the so-called jewelry and camera department. When Esgro terminated its jewelry and camera operations in the summer of 1972 and surrendered the premises to White Front, Mr. Wood took employment with White Front for a brief period of time, in essentially the same capacity, namely, heading up the jewelry and camera sales operations.

Q Do you know where Mr. Wood resides?

A I have seen an address attributed to him in the Los Angeles area. I have not verified it personally.

Q Mr. Holtzman, I show you here a notice to take deposition dated May 10, 1976, issued by the firm of Shea, Gould, Climenko, Kramer & Casey.

Have you ever seen a copy of that notice of deposition?

A Yes, I have.

MR. ZIRINSKY: Would you mark this for identification?

THE WITNESS: May I see this again and make sure the date is the same.

Yes, I'm pretty sure the one I saw.

(Notice to take deposition marked Plaintiff's Exhibit 4 for identification.)

Q Mr. Holtzman, the notice of deposition notices the deposition for June 9, 1976, at 10:00 a.m. at the offices of Loeb and Loeb, 1 Wilshire Building, Wilshire Boulevard at Grand Avenue, Los Angeles, California.

Mr. Holtzman, who is going to conduct this deposition if it takes place?

A I don't know.

Q Have you been requested to conduct the deposition?

A No, I have not.

Q Have you been requested to serve a subpoena upon Mr. Wood to require his attendance at the deposition?

A I have.

Q Have you served such a subpoena?

A I have caused the subpoena to issue. I don't know whether it's been served yet or not.

Q Do you have an address at which you believe Mr. Wood can be served?

A I have the address set forth in the notice, none other.

Q What knowledge would Mr. Wood have in connection with the disputes between Esgro and White Front and Interstate?

A Mr. Wood, to my understanding was, as I said, an officer and a director of Esgro, Inc., during the critical period of perhaps a year or year and a half, perhaps even two years prior to the -- before Esgro went out of the residential interior business. I understand that he participated in the discussions among the officers and directors of Esgro concerning whether to go into the residential interiors business, the risks involved, the financing of that arm of the business, the setting-up of that arm of the business and the difficulties encountered in getting the stores ready and inventory for them.

If I recall correctly, there was a point in time where he actually took over the operations of the residential interior departments, attempting to deal with the creditors, attempting to obtain inventory in the face of the pressure exerted by the creditors and the creditors' committee that was appointed in early 1972 for Esgro, and he remained in his capacity, as I understand it, until fairly late in the history of the residential interior department. I believe he is one of the more knowledgeable inside persons in the Esgro organization concerning why the residential interior department failed, and as such, I think his testimony would be quite important on these subjects.

Q But to the best of your belief, he resides in California?

MR. CARROLL: We will concede he does, your Honor.

Q Are there any other witnesses who reside in California, Mr. Holtzman, whose testimony you believe would be beneficial at a trial of the disputes on the merits?

A On the White Front side, certainly Mr. Epstein, Mr. Wood. There are two other White Front people who come to mind who might possibly be significant witnesses, Mr. Keros, I believe, who headed up the White Front accounting function, and a gentleman named Trujillo, who was the principal staff accountant.

On the Esgro side, obviously I think Mr. Esgro himself, who is known to me to be a resident of the Los Angeles area, and I suspect still is.

Q These people that you have described, would their testimony be more relevant to the issue of damages or the issue of liability in connection with the cross-complaint?

A The people that I have identified as

White Front people, I would presume would testify principally as to the issue of liability. Mr. Wood, I believe, would testify both on the subject of liability and the subject of damages.

MR. ZIRINSKY: I have no further questions.

THE COURT: All right; anything else?

REDIRECT EXAMINATION

BY MR. CARROLL:

Q Mr. Holtzman, you met with me in California a couple of weeks ago, concerning this case?

A I did.

Q Have you met with anyone else from our firm in California?

A Yes, I did. I met with Mr. Shelton, I believe it is.

Q And did he review some of your files?

A Yes, he did.

Q Did I also go through some of your files with you?

A You certainly did.

Q Have you had lengthy telephone conversations with people in my office concerning this case?

A I have.

Q Does White Front have any employees in California at this time that you know of?

A Not to my knowledge.

MR. CARROLL: No further questions.

THE COURT: All right, is that it? Is that the case?

MR. CARROLL: I have a couple more things which will take two minutes.

THE COURT: All right, thank you very much, sir.

(Witness excused)

MR. CARROLL: I would ask that we deem marked in evidence in this case the various discovery notices that have been served in connection with the trustees' applicatoin, the deposition notices, the interrogatories and the notice to admit. I don't have extra copies here, but they are on file with the Court.

THE COURT: As I gathered from the testimony, all of that is to take place in California?

MR. CARROLL: The deposition of Mr. Esgro was noticed for New York. The deposition of Mr. Epstein and Mr. Wood was noticed for California, and then there were interrogatories served and there was a notice to admit that was served and which I would just like the Court to be familiar with in connection with this proceeding.

THE COURT: If we are finished with taking all of the live testimony --

MR.CARROLL: With one possible exception, that is, I would like counsel to accept my statement at this point -- if they will not accept it, I will get on the stand and testify as to what I have done in connection with this case, in connection with one defense we have raised.

MR. ZIRINSKY: I will accept your statement.

One point I would like to point out to the Court.

In connection with the commencement of this adversary proceeding, we also filed on behalf of Esgro and Mr. Sulmeyer an application for a protective order staying discovery on the trustees' objection to the claim pending a determination by this Court as to whether or not the stay should be modified.

In the interim period we have been served with notices to take depositions.

THE COURT: Is there any question that everything remains in status quo?

MR. CARROLL: That had been served before we were down here. That was served the day before.

MR. ZIRINSKY: I also have a copy --

THE COURT: Is there any question that nobody is going to move for sanctions for failure to abide by any notices of deposition or interrogatories pending the decision of this motion?

MR. CARROLL: Your Honor, let me just ask, I don't see why we can't proceed with some discovery on a limited basis.

If the intention is really to proceed with this matter, no matter if it's here or in California, while your Honor is deciding the case, I don't see why we have to be stayed.

THE COURT: What I was intending to suggest was, if I had gotten an agreement, then everything would remain in status quo, would be to invite counsel to come back sometime when we don't have to inconvenience witnesses from California to attempt to summarize. I obviously have not had a chance to analyze Dr. Elliott's six-foot shelf, here, but I assume it's been succinctly summarized in the testimony.

What I was going to suggest was that we simply put this over for some time until the parties wish to sum up.

MR. CARROLL: Fine, and we will agree that nothing will happen in that interval, your Honor.

THE COURT: That is what I asked. I couldn't get a direct "yes."

I will tell you this. At the present time, after listening very carefully to the testimony of the witnesses -- and I am very grateful for the candor with which both of these gentlemen from California spoke -- it is going to be at least a five- to eight-week trial. I don't see any reason why the stay should not be vacated at the present time, the litigation to go forward in California, the trustees being directed -- and I don't think that they need such a direction-- to complete their discovery at the earliest possible time.

The movant is directed to proceed with discovery at the earliest possible time. The trustees and the plaintiff are directed to join in an application asking the head of the Master Calendar Department of the Superior Court for a preference, and then come back in about six weeks, let me know how your discovery has progressed.

Let me know the results of the application, if you shall have an answer to the application by that time.

So far as I can gather from all the testimony here, any discovery taken in the California action will be in exactly the same posture as though it has been taken on the objection to the Esgro claim, and this is my inclination as to what my decision will be, subject, of course, to argument, if you are so disposed, sometime next week, if you will set up an appointment with Mrs. James.

MR. YASSKY: We would like, your Honor, to be able to sum up before you very early next week.

THE COURT: I want to tell you how I feel now, having paid careful attention, digested all of the testimony and examined such exhibits as came in. But I will be glad to hear you if you wish to sum up.

In order to expedite the matter, I would ask the plaintiffs to submit a proposed order, and I will hear you on the settlement of that order.

Fix the date for the settlement of that order at some time that will be convenient.

MR. YASSKY: Can we submit a proposed order?

THE COURT: Yes.

MR. ZIRINSKY: I will prepare an order. I will give notice of the settlement to Messrs. Shea, Could.

MR. YASSKY: We propose a counter-order.

MR. ZIRINSKY: We will arrange a date with your secretary.

MR. YASSKY: Can I take it that your Honor's remarks were not in the nature of an order or decision but just an indication as to the thoughts your Honor was thinking?

THE COURT: Off the record

(Discussion off the record)

MR. CARROLL: Can I make the statement that I had offered before, that I was going to make?

THE COURT: As to what you have done?

MR. CARROLL: Yes.

THE COURT: Of course, it is in a sense bootstrapping to jump in and start to prepare for trial in the circumstances of a motion of this type.

For instance, can you tell me now

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the identity of the witnesses who you are going to call, if you were to try the case on the objection to the claim here in New York? Can you identify the people at the present time?

MR. CARROLL: Yes, your Honor, I can.

THE COURT: Who are they?

MR. CARROLL: The witnesses I would call would be primarily Mr. Kantor, Mr. Craig and I would either use the deposition or call, if available, Mr. Epstein, Mr. Wood.

phonetic

THE COURT: How about Mr. Craos and Mr. Trujillo?

MR. CARROLL: I would not need Mr. Trujillo or Mr. Craos on the objection to the counterclaim.

I would probably also call the former directors of Interstate and the institutional lenders and perhaps the accountant, all in New York.

THE COURT: As I view the question, at the present time in the present posture and keeping in mind that bankruptcy procedures

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are extremely flexible, all we are doing is deciding at this time under the auspices of which court pretrial discovery and deposition will proceed. You will proceed in California to see how fast you can get to trial, and then when you come back in about six weeks, as I would view it, as the best determination of this, we can then evaluate, have you completed discovery.

If you shall have completed discovery, then we will take a look at my calendar and maybe I can set aside five or six weeks. I don't think that there would be that substantially different a period in time of trial if there is a jury or not.

MR. CARROLL: Would your Honor retain jurisdiction over discovery questions that arose in order to regulate discovery so that we can come to you with our discovery problems?

MR. ZIRINSKY: I would believe that the California Superior Court is more than capable of regulating discovery.

MR. YASSKY: If I may just have one minute on this, I don't think there was any dispute -- there was no evidence adduced by plaintiffs --

THE COURT: That's why I very carefully asked, is your record complete, several times.

MR. YASSKY: -- contradicting the testimony of Professor Crowley, how crucial this is to this plaintiff's reorganization.

I submit, your Honor, the only way that this reorganization court can keep control over this single most crucial aspect to the pre-plan stage of this proceeding is if your Honor retains control of the discovery procedure in this so that we are not dilly-dallied and delayed out in California, that we have to return to your Honor's court.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Please set up a schedule between yourselves, discuss it with

Mrs. James and I will hear final argument on this matter sometime next week.

All right, have a good day.

MR. CARROLL: I still haven't had a chance to make the statement I wanted to make concerning the affirmative defense.

Will counsel accept as true the statement as to what's been done as contained in the Answer?

THE COURT: I had gathered that Mr. Zirinsky agreed that any representations that you made as to what you had done so far would be accepted.

MR. CARROLL: In the answer to the complaint.

MR. ZIRINSKY: I stated that earlier.

MR. CARROLL: In the answer to the complaint.

MR. ZIRINSKY: With regard to the services that Shea, Gould has been required to perform.

(The matter was closed at 4:20 p.m.)

* * * * *

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter

of

INTERSTATE STORES, INC., et al.,

Debtors

No. 74 B 614-902

United States Court House
Foley Square, New York, N. Y.
May 26, 1976
2:30 p.m.

Before:

HON. EDWARD J. RYAN

Bankruptcy Judge

ADJOURNED HEARING TO MODIFY STAY (Esgro v. Debtor)

Appearances:

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****

MR. ZIRINSKY: This is the summation with regard to the trial conducted before your Honor last Friday.

I don't know if your Honor has it in front of him, but we did settle a proposed order on notice and there is a counterorder, as well.

THE COURT: A tentative counter-order.

MR. ZIRINSKY: I don't know how tentative it is, your Honor.

THE COURT: I do, but I'm not going to tell you yet.

MR. ZIRINSKY: Your Honor, essentially we can proceed to the order, our proposed order basically incorporates your Honor's comments at the conclusion of the proceeding on Friday.

We have provided for modification of the stay and provided that the parties are to proceed in the California proceeding as expeditiously as possible with regard to completing discovery. The parties are to proceed and make application to the Superior Court of California with regard to obtaining a trial preference date on that Court's calendar.

We also provide, your Honor, which was also prayed for as relief in our complaint, for a dismissal of the trustee's objections pending before this Court without prejudice to be renewed at a later date, should this Court determine that in its discretion, that the continuation of the California lawsuit is onerous and burdensome to the estate.

I think, your Honor, the proposed order we have submitted essentially meets the criteria set forth by your Honor on Friday.

That is, merely with regard to the order.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Would you sum up, please, Mr. Carroll?

MR. CARROLL: Your Honor, I have examined the order submitted by the plaintiff in this case and I disagree with counsel's statement that it represents what your Honor said the other day. It goes about five times as far as I think your Honor indicated you were inclined to go the other day.

In fact, I think it is indicative of the plaintiff's intention to get the matter out of the control of this Court and delay it.

I think that if the Court signs

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this order, it will be the first step in an attempt to extract a completely unreasonable settlement from this estate, because I think that Esgro realizes full well that the trustee may be under considerable pressure to settle the case, because it is so crucial to get rid of the claim in order to form the plan of reorganization.

Now, I suggest it is all part of Esgro's strategy in this case, to get the case out in California and to then delay things enough that it has to be settled. If you look at the claim made by Esgro here and the complaint of White Front in the California proceeding and try to balance the merits, I suggest that Esgro's complaint suffers and has no merit at all.

I don't think it can be denied that the single most important factor in a case such as this is the effect the modification of the stay will have on reorganization of the proposed Plan.

I think the Second Circuit alluded

to this in the case of Stankil Developers, decided just last month, and I think that is a criterion set forth in Files versus Munsey.

At the trial of this matter last Friday, it was demonstrated beyond question that the ability of the trustee to formulate a plan of reorganization will be seriously hampered and jeopardized completely unnecessarily, unless this claim is resolved. The evidence was not contradicted in any way, and I submit that in a $40 million claim, that the Court can just about take judicial notice of the fact that this is going to hamper and tie up any formulation of a feasible plan of reorganization.

It was also shown that it would not be possible for the Court to make a determination as to the solvency unless the claim is resolved. A $40 million claim of solvency hangs in the balance and solvency must be determined before a Plan can be adopted.

Nor was it disputed that it is going

to take a minimum of eight months before we can get a trial in California and that is only if the California court grants a preference. If a preference is not granted and the trial date not advanced, it is going to take well over two years in California.

What does Esgro argue in opposition? They put evidence on that showed merely they would be inconvenienced if the claim is adjudicated in New York and not in California. They have shown that their files are in California.

We have shown that White Front's files are in New York.

They have shown that some of their witnesses are in California.

We have shown that quite a few witnesses are in New York.

In short, they have shown it may be more convenient for them to try this case in California. I don't think the Court should be concerned with Esgro's convenience, but perhaps they should be concerned with whether or not they will be substantially prejudiced if they are forced to come to New York.

There is no showing that there is any prejudice, either material or immaterial, to Esgro's coming to New York to litigate this claim. Every case which I have seen where a stay has been modified or lifted, the party asking that the stay be modified or lifted has shown substantial prejudice will be suffered if the stay is not lifted and they are not permitted to litigate a claim in this State Superior Court.

THE COURT: Let me ask this: Having had a chance to digest the testimony, how long do you estimate the trial of the objection in this Court will take?

Mr. Shertz estimated five or six weeks. Your witness estimated six to 10 weeks.

MR. CARROLL: I think both estimates are exaggerated, your Honor.

THE COURT: These are the two men who have been trying this case in California.

MR. CARROLL: The case has not been tried in California. It was started in California three years ago and then it sat there.

THE COURT: I know it has not been tried in California. It has been in litigation in California.

MR. CARROLL: But nothing has been done by the other attorney.

I think that the Court should be concerned here with substantial prejudice. I think we have shown that the estate will be substantially prejudiced if this case is moved out to California and further delay is encountered.

I would like to say a brief word about the merits of the claim of Esgro that we are trying to expunge.

I think it is kind to describe it as grossly inflated. Originally it was a $35 million counterclaim interposed as a defensive measure out in California. $24 million of the $35 million claim is lost profits.

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The plaintiff's attorney admitted that he has examined the actual operating statements and Esgro never showed a profit in the residential interior departments.

I think this shows no chance of recovery of lost profits.

(Pause)

MR. CARROLL: I have carefully examined the proposed order submitted by the plaintiffs here. It provides that the trustees' objection to the claim and the application to expunge the claim will be dismissed.

Why is this necessary?

THE COURT: It is not necessary. It is meaningless. It is dismissed without prejudice.

MR. CARROLL: It is not meaningless.

What happens if we go to the California court and they say we are not going to give you a preference? Under the plaintiffs' order, we come back on July 31st and start from scratch. We have to serve a new application and start with new discovery.

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We are wasting three or four months.

They want the claim dismissed with prejudice --

THE COURT: Without prejudice --

MR. CARROLL: That means we have to start all over again.

THE COURT: It is your understanding, then, that if it is dismissed without prejudice, that this will erase all discovery and you start all over again with new discovery?

I think that is what you're saying.

MR. ZIRINSKY: I think that the order --

THE COURT: Even in Alice in Wonderland, I doubt that any court system would operate in that fashion.

So, can the record indicate -- Why don't you amend this to simply suggest that the objection be marked off without date.

Is that agreeable? Does that satisfy your concern with respect to whether the discovery would be expunged if their order were signed?

MR. CARROLL: I am not worried that discovery is going to be expunged because no discovery has taken place.

We have sent out notices for discovery but it would still be restored on 30 days.

Why can't we go forward between today and July 31 and proceed with discovery? Why can't we proceed with that?

THE COURT: Do you have any objection to having their discovery on the objection to the claim be deemed the discovery in the civil action pending in California?

MR. ZIRINSKY: None whatsoever.

THE COURT: Let's have your next point, Mr. Carroll.

MR. CARROLL: That is exactly what our proposed order provides, your Honor, that we continue discovery now, and it is deemed discovery in the California action if we go to trial in California, and any discovery done in California be deemed discovery in this Court if we go to trial here.

That is what our proposed order

provides.

THE COURT: Look, if we are going to address ourselves to the Order in and the Counterorder, do you have any serious quarrel with the proposed order of the trustee?

MR. ZIRINSKY: Yes, I don't believe it is in the interests of the parties nor is it in the interests of the Court, for us to have discovery proceedings going on before two Courts.

THE COURT: There are not going to be discovery proceedings before two Courts.

What paragraph of their Order do you object to?

MR. ZIRINSKY: On page 2, the third decredal paragraph, "Ordered, that all discovery and all other pre-trial proceedings and proceedings herein instituted by the trustee on their application to expunge claim number 7273 of Esgro and the California proceedings be conducted and completed on an expedited basis --"

THE COURT: So far, there has been a notice of the taking of a deposition

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upon oral examination of three witnesses in California.

MR. ZIRINSKY: We will stipulate as to a deposition schedule.

THE COURT: What difference does it make whether those depositions on all examinations be taken under the caption of a Chapter X or the civil suit pending out there?

MR. ZIRINSKY: None whatsoever.

THE COURT: Let us get on to something that has some meaning.

MR. CARROLL: Your Honor, that is the basic premise of our proposed Order, that discovery be continued from now on, and at the same time we go to the California court, and in six weeks we come back to your Honor and tell you what progress has been made, both in discovery and in the California court.

California is not a preference, but then we have not lost time.

Under the plaintiffs' proposed order, we are going to lose maybe two or three months' time waiting for the California court to decide whether to give us a preference.

THE COURT: You had me completely mystified.

What does the preference motion have to do with discovery and deposition?

MR.CARROLL: It should not have anything to do with it.

If Plaintiff is willing to concede that discovery can go forward as noticed here and discovery is to be used in both actions depending on where the case is tried, which is the Fourth Decredal Paragraph on page 2, we come back to you in six weeks, then I don't think we have any disagreement.

MR. ZIRINSKY: Your Honor, I think I can resolve this.

My only concern is that I don't want two different courts regulating discovery if there are going to be sanctions imposed --

THE COURT: Or if there are going to be traveling expenses. If you notice the taking of a deposition for somebody from

New York, are you going to pay for their traveling expenses?

Is this what you're getting at?

MR. ZIRINSKY: How can we have two courts speaking to the same question?

What I'm suggesting is that any discovery that has been noticed thus far in connection with that objection can be proceeded with. All I'm suggesting is that if we are going to try to go forward in California then let the discovery resume in California. Let us proceed with this here under the auspices of this Court,

But, with regard to continuing discovery, let it continue in California with a stipulation between the parties that all discovery taken, whether before this Court or a California court, can be used in connection with the trial, regardless of where the case will be ultimately tried.

THE COURT: So if I ultimately find out that you can't get a trial within a reasonable time in California, back here you come, and it will be deemed that all of the discovery in California had been taken in the Chapter X -- you mean two busy lawyers can't come to an agreement on language?

MR. ZIRINSKY: I don't want two courts trying to regulate disputes between the parties, and I think the decision should be made either that this Court is going to regulate it, or that a California court will regulate it, inasmuch as there is going to be an effort to proceed with the trial in California, until at some subsequent point it is clear that the trial is not going to move forward at a sufficiently quick rate of speed, then we can come to this Court. That is what our order provides, that this Court is going to maintain control over the matter, and if there is a SNAFU in California, we come back to this Court. If there is not a SNAFU, then the matter will proceed in California in the ordinary course.

No one is asking to wipe out the discovery.

THE COURT: Let me ask you this, Mr. Carroll:

Other than the depositions that have already been noticed, what do the trustees propose to do in the context of discovery and depositions on objections to claims here, that they would not be pursuing in California?

Can you give me a "for instance"?

MR. CARROLL: There is probably more to be done in California, if we are going to have to litigate the claim out there. There are more requests for admissions and more interrogatories than -- some more depositions to be taken but as far as our objection to claims, I think we have noticed the three depositions we wished to take, and served interrogatories which have to be answered.

THE COURT: Why should it not be deemed that those notices of taking depositions had been served in the California litigation? Is there any problem with that?

MR. CARROLL: Yes, the problem with

that is, I think we are only talking about a six-week period before we are back here. If we are going to have any problems, I think your Honor should deal with them until you find out a little more definitely what is going to go on in California.

I would hope that if we find out in six weeks that we are not going to get a preference and it will take two years to get a trial in California, that your Honor is going to give serious consideration to keeping this matter.

THE COURT: In other words, you don't propose to go on with discovery in California until you find out as a result?

MR. CARROLL: No, we will go on.

MS. WIENER: Your Honor, I think that before we determine where discovery should take place, why not determine if, in fact, the matter is going to be transferred to California.

I believe we have not spoken and we don't believe the matter should be transferred to California.

THE COURT: The trustees' counsel is addressing himself to the form of the order.

The counsel for the plaintiff has addressed himself only to the form of the order.

If you would rather sum up on the question of whether there should be any transfer, I would be glad to hear you, because it appears that neither the attorney for the plaintiff nor the attorney for the defendant wishes to be heard on the merits.

MS. WEINER: Your Honor, I would very much want to be heard on the merits.

THE COURT: Tell me why the stay should not be vacated to the extent of permitting the case to go forward in California?

MR. CARROLL: I want to clarify something.

I have spoken, I think, against the relief demanded in the complaint. I have stated why I think the stay should not be vacated or modified, and why the matter should be kept before your Honor. I then addressed myself to the form of the order, assuming your Honor goes forward with the preliminary decision you announced last Friday --

THE COURT: If what you said this afternoon was intended to be a summation of why you think the case should not go forward in California, you have told me nothing that would persuade me that it should not go forward in California.

Now, Ms. Wiener wishes to be heard on behalf of the Commission as to whether the case should go forward in California.

Why discuss the terms of the joint pre-trial discovery and depositions if Ms. Wienermay be going to persuade me that the trustees' position is correct and the California proceeding should remain in limbo?

Do you follow me?

MR. CARROLL: I follow what you are saying.

THE COURT: Good, then let's hear from Ms. Wiener.

MS. WIENER: Thank you, your Honor.

Your Honor, we trust that this matter has not yet been decided and that your inclinations of last Friday were preliminary and that you are still listening to our arguments, as well.

Your Honor, this reorganization has been ongoing for two years now and it is very close to realizing our goal of having a plan formulated within two years.

The claim of Esgro, the largest single claim filed in this proceeding which right now represents over fifty percent of the claims which have yet to be reduced, is now holding up the formulation of the plan.

Let's take a step back and look hard at this claim. It is not an ordinary claim, and this is not an ordinary motion to modify a stay so that a claim can be heard in some other court. This is a superclaim. A claim, the determination of which, will control whether or not this proceeding will come to an expeditious conclusion and will control the very nature of a plan of reorganization.

It is abundantly clear, we believe, that a swift resolution of this claim is essential to formulation of a plan. We submit that this claim is controlling and that its determination is essential to formulation of a plan.

We know of no instance where a Chapter X court has sought to relinquish the determination of a claim of this magnitude and of this centrality that so goes to the essence of the entire Chapter X proceeding before it. In fact, your Honor, we would submit that it is unprecedented.

Further, we submit that to relinquish this claim is mind-boggling. It represents a relinquishment of control of the entire proceeding. To lift the stay here would be to relinquish control and would amount

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to yielding the progress of this proceeding as well as the proceeding itself to the control of a State court in California.

Your Honor, if Section 196 of the Bankruptcy Act is to have any bearing at all on this proceeding, it is here that this claim should be heard and determined by this Court, not the State Court.

We submit there is no claim more worthy than this one of this Court's determination. There is no claim that goes more to the heart of this debtor than this one.

Your Honor, the trustees here represent the entire community of interests in this reorganization. The Commission represents the public interests. There are literally thousands of shareholders, members of the public, whom we represent in this reorganization, and the Commission is the statutory party charged with the responsibility of representing the public interest.

The resolution of this claim will determine whether the public shareholders

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will participate in the reorganization and if they do so participate, the extent of their participation.

The resolution of this claim literally spells life and death for the public interest. This should not be decided by a State court. The public interest will bear the brunt of the impact of the determination of this claim, whether it be favorable to them or not, and therefore, they are entitled to our representation and to our participation in the determination of this claim. By transferring this claim to a State court in California, our client would be deprived of our representation and our participation in the determination of this claim.

Moreover, it would deprive the Commission of its responsibility in carrying out of the statutory obligations to represent the public interest in Chapter X proceedings. The Commission has no authority to participate in State Court proceedings. We could not participate in the determination of this claim. We would have no right to. It goes beyond our Congressional mandate and is not contemplated by the Bankruptcy Act or by the practicalities of the present situation.

Therefore, we respectfully suggest that to allow this stay to be lifted and transferred to a State Court in California and thus deprive the Commission of carrying out its responsibilities, would be an impermissible exercise of this Court's discretion.

We respectfully urge that this Court hear and determine the claim of Esgro filed in this proceeding.

THE COURT: Has the Commission come to any conclusions as to the length of time it would take to try the claim?

MS. WIENER: We really have not.

THE COURT: I had a witness in front of me, Arthur Sherwood, and he seemed to be an honest man. I have no question of his bona fides, and he said that five or six weeks of trial would be required.

Attorney Holtzman testified and indicated that it would take six to eight weeks to try this case.

Now, on the assumption that it is going to take a minimum of five weeks to try the case, I think that all the authorities shriek with the spirit that the case shall be tried as soon as possible and Foust versus Munson indicates all of the things it indicates with respect to jury trial and so on -- I have some 964 active cases. I don't know when it would be feasible for me to set aside five weeks to try one claim in one case.

Now, we don't yet know whether the California court will give this case a priority so that it may be tried in a very short period of time. This is not a transfer of a case, it is a vacature of a stay. A stay of an action really commenced by the trustees' predecessor, the White Front Stores. It is simply letting litigation go forward.

You emphasized the Commission's

participation. Well, I hardly think that the attorneys for the trustees are in desperate need of associate counsel. They are extraordinarily competent.

MS. WIENER: Your Honor, we are representing the public. The trustees represent the entire community of interests. We represent the public. If this is transferred to California, if the stay is lifted, we can't participate. To whom do our clients turn?

THE COURT: The trustees are required to represent all of the creditors. They also have the obvious responsibility. I think I can take judicial notice that the Courts in California have a relatively civilized method of trial of litigation that can come out with a proper result.

MR. YASSKY: Can I be heard?

THE COURT: Are you finished, Ms. Wiener?

I do have a completely open mind -- as we parted the last time, I gave you my tentative conclusions and said I would listen to anybody who wanted to try to persuade me that this case should not go forward in the State court. It is litigation that anteceded both the Chapter XI of the plaintiff here and the Chapters XI and X of the defendant here.

MS. WIENER: Your Honor, let us look at the situation we are presented with. We are presented with a Chapter X debtor and a situation of a close-to-$40 million claim whereby lifting the stay that claim will be determined and by its determination the entire role of the shareholders is going to be determined by a State court.

THE COURT: What is wrong with that? This is why stays are permitted to be vacated.

MS. WIENER: It is not just a stay and it is not just another claim. It is the very heart of this case. The entire character of our plan would change.

THE COURT: I hear you and understand what you're saying, but I don't think it has all that much to do with the question as to whether the suit should go forward in the California court.

At the present time, it is of no moment that I can see, other than captioning of papers, whether the pre-trial discovery and depositions shall be captioned in the Chapter X proceeding or in the State Court proceeding.

I know that the trustees are going to proceed with all due diligence, and I know that the plaintiff in these proceedings is going to proceed with due diligence. If anybody shall drag their heels, they can come back here to reinstate the stay and set down the trial of the objections to the claim.

Let us keep in mind, there are parties in the California litigation who are not before the Court. There is a proposed dichotomy of trial here, namely, try our trustees' claim in California and you suggested try the Egro claim here in this Court. That in and of itself bespeaks of two trials, rather than one trial, in the State court in California.

MS. WIENER: I am not addressing myself as to where the trustees try their claim. I would suggest they might possibly bring it here.

Regardless, I am not addressing myself to that.

In terms of captioning it under a District Court or State Court in California, we are precluded from participation. Surely your Honor will take judicial notice of the fact that we have participated in the proceedings since their inception. I would be hard-pressed to recall a trial date before your Honor where a member of the Commission has not appeared, whether or not they had a position to take, and no matter how small or insignificant the matter.

At this point, we do not believe we should be deprived of participation, not given the size of this claim and the impact that this claim can have on shareholders and on their participation in a claim.

After all, we are all here to see a plan.

THE COURT: I understand your position.

Mr. Yassky, you wish to be heard?

MR. YASSKY: I think that counsel for the Commission quite ably tried to bring before your Honor the relevant considerations as to how important this claim is and how central it is for the reorganization. I won't reiterate that.

I think what your Honor is focusing on and what I hear from your Honor is a very practical aspect to this whole matter. How fast we can resolve this and where the best place is.

Your Honor seems to have placed a great deal of emphasis on the testimony of the two counsel that testified as to what and how long they thought it would take in California.

I would respectfully like to make comments on that testimony.

There has been no discovery taken in

this proceeding yet. So, I think it can fairly be said that they are guesstimates on behalf of both counsel.

THE COURT: So let us get on with the discovery and come back a short period of time and show me that as a result of the discovery, that you have shown at that time that the claim is de minimis.

MR. YASSKY: The objection to the claim naturally is really the essence of their counterclaim.

THE COURT: Mr. Yassky, I assume California has a procedure for summary judgment, and as a result of all the discovery, you can move for summary judgment.

MR. YASSKY: We consulted with counsel on that question and he said the courts are very reluctant to grant summary judgment actions.

THE COURT: I was also impressed with his candor that even though he was an advocate, he did not summarily say insofar as he was concerned his adversaries' position was a total nullity.

MR. YASSKY: The way I read that was that he did not want to cast any aspersions on California counsel who filed the action.

THE COURT: -- evaluations made by the bankruptcy judge for the reasons stated that he was only estimating it for purposes of the deposit.

MR. YASSKY: With respect to the length of time this might take, it is basically their claim that they are going to have to prove, our objection is in the way of a denial.

They are going to have to come forward and prove this absurd claim for $38 million. How long it will take, we don't know. After discovery, we will all have a much better idea. All we are suggesting is that you retain control of this because it is so central to this reorganization.

If there is any delay out there, we want you to know about it, and we want you to have jurisdiction about that. We will cooperate and we instructed Mr. Holtzman, when he left here on Friday, in anticipation, to start getting up the papers for going to that Court. We don't need an order to go to the California court as soon as possible.

Let's get a reading from that California court. If we can try that action in California in a month or four months or three months or a short period of time, we'll be glad to go to California. The costs involved are minimal, compared to the million dollars in interest that it is costing every month. Think what it means to them to know that.

THE COURT: I am not going to get involved --

MR. YASSKY: Forget I said that. Strike that remark; just the fact of the interest in this case, and the 5,000 public shareholders and the interest of everybody in getting it finished.

THE COURT: That was countered on the assets on hand.

MR. YASSKY: That is half. There is $60,000 in cash, and a minimum of $150 million in claims. We are talking about

$666,000, and not $1 million.

All I'm asking your Honor is to keep control of this matter and push discovery on this, and we will go out to California and get a determination as soon as the California court wants to decide it.

Maybe we will go before a Judge who likes to sit six months before deciding. We will make the motion.

THE COURT: If that happens, you then come back in --

MR. YASSKY: In the meantime, we ask to continue discovery and have this Court retain jurisdiction. Lift the stay for the purpose only of proceeding in that court out there, and to get a determination of how fast it can be done.

In the meantime, let's go forward. We will stipulate to anything that is reasonable in terms of costs.

THE COURT: Why do you want to have discovery under the aegis of this Court on your objections to the claim, rather than having discovery under the jurisdiction

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of the California Court.

MR. YASSKY: Because I think your Honor has a much better picture of this entire matter. How central and important it is in the second largest reorganization, and, I submit, the most successful one that will come out of this jurisdiction. If there is cooperation, we will not have to trouble your Honor with anything on this. We will proceed as fast as possible and get it over with. That is all we are asking.

MS. WIENER: In addition, if discovery is conducted under the aegis of this Court, the Commission is free to participate, may and will participate in the determination of a claim of this size.

Under the aegis of the Superior Court in California, we could not so participate.

MR. ZIRINSKY: Your Honor, a number of comments.

A couple of points, counsel for the trustees have consistently -- and I'm appalled by this -- they constantly impugn our good faith and our client's good faith. There is nothing in the record which justifies these accusations.

It seems to be that Mr. Yassky is saying, "Well, the trustees' counsel and trustees are going to proceed in good faith, but if they don't do it, we are going to come back and let you know about it.

THE COURT: They have the whip and can come in at any time and ask to have the stay reinstated, because you are not proceeding with due dispatch. It seems to be this simple.

MR. EIRINSKY: I would merely like to note, for the record, that Esgro is also a public company. Esgro is in the process of emerging from Chapter XI. The SEC took a very active role in the Chapter XI and filed a 328 motion in that case, claiming that the public interests compelled that this be treated in a Chapter X as opposed to a Chapter XI.

After months and months of litigation

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in the California Bankruptcy Court, after an adversary ruling against the SEC in the California Court, the Chapter XI proceeding had a plan filed and the SEC reviewed the plan and made no objection.

The case has proceeded to confirmation. There is a public interest on both sides.

For this action or for the claims and the disputes between the parties to be bifurcated, with the trustees prosecuting their claims in California and Esgro compelled to prosecute in New York. You have twice as much time involved and two courts involved, having to deal with the same issues and twice as much expense involved.

For the SEC to come in and claim, especially in the light of the fact that it is not clear whether a final determination would be reached more quickly here or in California, for the SEC to jump to the conclusion without knowing the facts and claim that it is against the public interest for this action to proceed in California, is totally, with all due respect to Ms. Wiener, absurd.

MS. WIENER: I think counsel has misstated our position.

MR. ZIRINSKY: I don't believe so, and I think the record will bear me out.

As far as relinquishing control of the case, it is agreed that this Court retain control. In the event it gets bogged down in California, the case will come back here.

In terms of discovery, it is ridiculous to have discovery being proceeded with in two different courts. We have agreed to stipulate that any discovery can be proceeded with, and any discovery that is required in addition to that can proceed in the California court. We are agreed to stipulating that all discovery, regardless, all discovery can be used if a trial is either in California or in this court.

I see no basis upon which the

trustee can object to that set of ground rules going forward on discovery.

Your Honor, I think that basically sums it up. I think the SEC should consider the fact that there will be additional expenses of administration in this case should the claims of Esgro and the claims of Interstate be bifurcated into two separate proceedings.

You have to pay two counsel fees and witness costs and expenses in two cases, and you have to pay transcript fees in two different cases. Above and beyond all of that, you have a waste of judicial time and effort which is totally contrary to the judicial systems where the courts have repeatedly stated that where you have claims arising from the same series of transactions, they should be resolved before one Court, where all the parties can be brought together and all the claims resolved in one ball of wax, and a final and complete determination can be made and rendered as between all the parties and claims.

I think, your Honor, that in light of all of this, that the arguments proferred here today are basically without merit.

MR. ARONSON: May I be heard, your Honor?

Your Honor, I am not going to address myself to the merits of the application.

Mr. Goodman of my office presented the feelings of the institutional lenders at the hearing on Friday.

I am going to address myself only to the form of the order as presented and assume that your Honor is going to adhere to the preliminary views that you expressed on Friday.

THE COURT: Yes, everything I have heard today only fortifies my opinion expressed at that time.

MR. ARONSON: I am going to address myself to the second and third decredal paragraphs, and what I understand is the counterorder by the trustee.

My firm is not served with a proposed order by Esgro and I have some idea of what it says --

THE COURT: I don't think we have to concern ourselves with the proposed counter-order.

MR. ARONSON: I am going to say this: the second and third decredal paragraphs of the trustees order provide that there is going to be an application made to the California court and the third decredal paragraph requires the proceedings to be conducted and completed on an expedited basis. Such language is vague, and that is not going to solve any problems.

I would suggest that the second decredal paragraph be deemed as to unless the California court grants a preference and there is a trial date set within a period of time directed by your Honor, then this Court will retain jurisdiction over the matter and as far as the pretrial proceedings, they too be completed within a particular period of time, rather than

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retaining jurisdiction for the sole purpose of having the parties come back to your Honor.

THE COURT: What date do you suggest as being the terminal date in this case?

MR. ARONSON: I cannot suggest a date.

THE COURT: Because you don't know anything about the case.

MR. ARONSON: Nobody seems to know.

THE COURT: Messrs. Sherwood and Holtzman know about it. I think all of this talk about putting in terminal dates, as Mr. Yassky said, get the discovery and inspection over with as soon as possible and then we will know where we stand.

MR. ARONSON: Where do we stand if a California court refuses to grant the application for preference?

THE COURT: I rather surmise that Mr. Yassky may consider coming back in here, calling that to my attention and then asking that the stay be reinstated.

Am I correct, Mr. Yassky?

MR. YASSKY: Yes.

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MR. ZIRINSKY: It is our understanding as well.

THE COURT: I can't assume bad faith on the part of the plaintiff here that they are going to drag their heels in the California court.

On the record, I have indicated my very respectful request to the California court that they do recognize this as one of the biggest reorganizations in the history of the American bankruptcy system. Maybe it will carry some weight. Maybe they will give it a preference. Neither of the attorney s has had such experience before.

Using that as a basis for an application for a preference, I recall the testimony that one of them said, in their opinion, the California court would give it consideration.

If I'm told there is no possibility of a trial of this claim in California before two years, obviously I'm going to have to carve out a sufficient period of time to try it.

Meanwhile, however, it appears to me that there is no reason why discovery and inspection should not commence and proceed as soon as possible in the California case, and the parties will report back to me on the results of the motion for a preference. They can come back and complain to me if there is any question of dilatoriness on the part of either side. It is possible that the plaintiff will come back and ask for instructions to the trustee to move a little more expeditiously. I don't intimate that I have the slightest suspicion that such will happen.

MR. ARONSON: I don't accuse either counsel of being dilatory. I am only concerned that we will have the same problem that we have in New York. It is a burden on any Court, be it State or Federal, to ask the Court to carve out five or six or eight weeks to try any issue.

What we suggest is that the trial be held in this Court because of your Honor's remarks that this is a case which is unprecedented in the history of the American Bankruptcy System. We think that a Bankruptcy Court should be the Court that should rule.

MS. WIENER: Why should a California court grant a preference and give six or four weeks to hear a case that is so deeply concerned with a Chapter X filed in the Southern District of New York?

THE COURT: You are asking me to express an opinion. I don't know what it is going to do.

MS. WIENER: Why should it, if this Court won't? Nobody knows how long the trial will take.

THE COURT: I can only refer you to Mr. Yassky's very sensible comment: "No one is going to know until the D & I has been completed." Both of the attorneys who testified indicated there is considerable D&I to go. All right.

Off the record.

(Discussion off the record.)

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MS. WIENER: In the interim --

THE COURT: Discovery will go forward out in California. The three depositions have been noticed for the California area --

MR. CARROLL: One has been noticed for New York.

MS. WIENER: Until we determine what the preference is that the California court may or may not grant, should not this Court retain the aegis over the discovery?

We do have Rule 10103, which could be implemented, perhaps if your Honor's calendar does not have the time, perhaps a special master could be appointed.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Of course, any of the parties are free to make an application to an appropriate court for the appointment of a special master.

Anything else?

MR. YASSKY: If I may ask the indulgence of your Honor, I think this matter is of such importance that I think the text of this order will have great significance in the future of this proceeding, and I would respectfully ask ten minutes of your Honor's time to go through four or five simple decredal paragraphs --

THE COURT: I have all afternoon.

MR. YASSKY: -- and ask for your Honor to consider our order.

THE COURT: Let's go down the line, side by side.

MR. YASSKY: If your Honor would look at our first paragraph.

THE COURT: What is the difference between what Sulmeyer asked and what has been granted?

The prevailing parties --

MR. YASSKY: We can stipulate it to the second paragraph. What is important is what follows.

The second paragraph -- the essence of the second paragraph is the same in both orders.

It is the third paragraph in theirs

but substantially it is the same.

Looking at the third decredal paragraph of our proposed order, "That all discovery and pretrial proceedings, both the proceedings instituted by the trustees on their applications and in the California proceeding, be conducted and completed on an expedited basis."

What does this mean?

It means we are interested in time here, your Honor.

THE COURT: Why do I have to put those words into an order? I have said it any number of times.

MR. YASSKY: Because they have something like that in their paragraph, and I respectfully suggest that the implication of their language is going to have an adverse effect on this proceeding.

All we are saying is, we have already noticed discovery in April and there has already been a seven-week delay. If we can continue with the schedule that has been established, we are that much further along.

If this goes out to California again --

MR. ZIRINSKY: Mr. Yassky, I have already stipulated that we will proceed on the basis that notice of depositions is already served.

THE COURT: It did not say it, but the minutes say it. Do you assume that these attorneys or the other attorneys are going to seize upon the absence of language in an order for some nitpicking?

I am assuming that these are big boys that you are dealing with.

MR. YASSKY: If I can ask the "Big boys," your Honor, does this mean that the interrogatories that we served and the notice of deposition we served will be answered in the time specified in the notice?

These are already delinquent.

THE COURT: Will you agree that they are deemed served in accordance with the California practice? And we have what --

We have depositions and interrogatories?

Can you tell me when the interrogatories will be answered?

MR. ZIRINSKY: I cannot say for sure, but I would impress upon Mr. Sherwood that he must expedite as soon as possible and have his clients respond to the interrogatories as quickly as possible.

If possible, I will have him call Mr. Yassky and arrange a time upon which the interrogatories shall be answered.

With regard to the depositions, the timetable --

THE COURT: The time has passed. I assume intelligent attorneys in California are going to accommodate themselves to their own time schedules and what they must realize are the exigencies of this particular litigation.

I believe I made inquiry of the attorney whether he could assure us that his office was sufficiently manned to get this case a priority. I think he said they have 125 attorneys in the firm,

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60-some-odd of whom are litigators.

MR. ZIRINSKY: One of the depositions, which is noticed here in New York, is a deposition of Esgro by Mr. Frank Esgro, a resident of California.

We would request that the attorney for the trustee, that their Esgro deposition be taken in California by Mr. Holtzman.

Mr. Holtzman is available to do it.

MR. YASSKY: We have no problem as long as it is on the date it is scheduled for. He has had two months' notice.

MR. ZIRINSKY: You said it is past due.

MR. YASSKY: The time to answer interrogatories is past due.

MR. ZIRINSKY: I am suggesting that I will have Mr. Sherwood call you this afternoon, Mr. Zirinsky, and arrange with you a mutually convenient time and place for these depositions to go forward. I can't speak for Mr. Sherwood as to whether he is going to be available on that particular date and time.

THE COURT: We are in a morass which we have already discussed. When the parties who are going to be charged with the responsibility for the trial of the case feel that the other side is not conducting himself properly, the parties can come back to me.

Mr. Yassky, if you feel the attorney in California is not proceeding expeditiously, you can always move de novo for a stay, and I will hear the parties.

MR. YASSKY: All I submit, your Honor, is that everything that has been said and agreed upon so far is encompassed in the third and fourth paragraphs.

As to the fifth paragraph --

THE COURT: You prefer to have your order signed?

Are you willing to --

MR. ZIRINSKY: The problem with the trustees' proposed order, in essence, all it says is that we are modifying the stay to permit --

THE COURT: Let's go paragraph by paragraph.

First paragraph, any objections?

MR. ZIRINSKY: I would take out "Only to the extent indicated herein," your Honor.

THE COURT: Any objection to that, Mr. Yassky?

MR. YASSKY: No problem with that.

THE COURT: Good. Next paragraph. What is your quarrel with the trustees' order on the next paragraph?

MR. ZIRINSKY: No objection to that, your Honor.

THE COURT: Fine. Next paragraph.

MR. ZIRINSKY: The only thing I would comment with regard to this paragraph, I would like it clear that discovery is to proceed in California.

MR. YASSKY: What does "In California" mean?

THE COURT: No. Rather than that, can it be understood, on the record of this proceeding, that the trustee will not undertake to pursue discovery and inspection within the proceedings on objections to claims, but rather, they will have their D&I in the California lawsuit.

I think that is the problem.

MR. YASSKY: Yes, it is a problem, but until it is finally resolved where this is going to be tried, and that has not been determined --

THE COURT: When this order is signed, it is going to go forward in California, subject to being stayed, re-stayed on a showing, either that the attorneys in California for the plaintiff are being delatory, or that it is not feasible to get an early trial in California.

Let's go back to the first paragraph.

"The stay is modified so they are going to go forward with the suit."

MR. ZIRINSKY: Could we insert the words, "to allow the California proceeding to proceed?"

It just says modified.

THE COURT: Do you intend to start

conducting any discovery within the framework of the objection?

MR. YASSKY: We have already done it.

THE COURT: Right, and your adversary has agreed, and I assume you agree, that that would be deemed to have been commenced in the California suit.

MR. YASSKY: Why can't it be deemed to be used for both purposes?

THE COURT: It is in fact commenced in the reorganization proceeding but it may be used in the California proceeding as though taken in the California proceeding.

MR. YASSKY: Let's say that.

THE COURT: And the order that will finally eventuate, you can so provide.

MR. YASSKY: I really regret to ask your Honor to give us time for this purpose, but I submit that the matter --

THE COURT: What language do you propose for your third ordering paragraph?

MR. YASSKY: That is the fourth paragraph, "that all discovery and pretrial --"

THE COURT: Have we gotten by the third paragraph?

MR. ZIRINSKY: I don't believe so, your Honor.

MR. YASSKY: Just say all discovery and pretrial proceedings be conducted and completed on an expedited basis. Just an order that we do things expeditiously.

THE COURT: I think least you start commencing --

MR. YASSKY: We have already commenced.

THE COURT: -- that you might continue to undertake to have discovery on the objection to the claim. I see an inconsistency in having that while the same matters are litigated in the State court.

MR. YASSKY: My brethren keeps on talking about a bifurcation of acts and duplication of time and effort and double expenses and lawyers.

I respectfully say that is not the case. There will be one deposition taken that will be used, depending on where this is going to be tried. There will be one notice to admit documents, and it will be used wherever we end up trying this matter.

The third paragraph will expedite the discovery and pretrial proceedings and the fourth paragraph may be used in either proceeding depending on where it is to be tried.

THE COURT: Somebody is missing something very simple.

Is your firm going to be in charge of the trial of the objections to the claims?

MR. YASSKY: Yes.

THE COURT: I assume if you wish to examine Mr. Esgro, that you would notice the taking of the deposition in New York.

MR. YASSKY: We have done that already, but we will accommodate him and do it out there.

THE COURT: I think we are talking about nothing.

MR. ZIRINSKY: I think it is a question

of putting the right language in the order.

THE COURT: What is your quarrel with the third paragraph, as submitted?

In the light of the record in the extent that it is necessary to construe it --

MR. ZIRINSKY: I would merely request the addition of "heretofore noticed" with regard to the proceeding on the application to expunge the claim so that it is clear that discovery is to proceed under the California court's auspices.

MR. YASSKY: I have no problem with that.

THE COURT: Is it agreeable?

MR. ZIRINSKY: "To the extent heretofore noticed."

THE COURT: After "the trustees proceeding" to the extent current.

MR. YASSKY: Heretofore noticed.

THE COURT: Strike "current" and substitute "heretofore noticed or served."

MR. ZIRINSKY: With regard to the next paragraph, your Honor.

THE COURT: Yes?

MR. ZIRINSKY: I would request that the words in the third line, "or hereafter" be stricken and the words inserted, "hereafter commence in the California proceeding."

THE COURT: That is a quibble. If they do undertake to commence further proceedings on the objection to the claim, you will come in screaming that there is no valid reason for it, and I will probably grant your request as the case now stands. Maybe they will be able to persuade me there should be further discovery.

MR. YASSKY: As to the last paragraph, the July 8 date is distinct from their July 23rd date, because you said six weeks, and not nine weeks.

THE COURT: All right. What's the difference?

MR. ZIRINSKY: The last paragraph I would request be stricken.

THE COURT: Why?

MR. ZIRINSKY: It puts the tenor of the order in the sense as to the application of this stay being denied.

As far as I'm concerned, the application is granted with certain limitations. If a dispute should arise, and I hope there won't be any dispute, as to the provisions of this order, I think we would want it clear that the Court has modified the stay to permit the California action to proceed subject to a continued control by this Court.

THE COURT: I think that is entirely a quibble.

What about the dateline? Any problems?

MR. ZIRINSKY: None whatsoever.

It is a battle of the forms, your Honor.

THE COURT: Have a good day.

(The hearing was adjourned.)

OFFICE COPY
A 318

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants.

Reorganization
Nos.
74 B 614 - 802

STIPULATION

It is hereby stipulated and agreed to by and between the undersigned that the documents submitted herewith under separate cover are true and complete copies of the following:

1. Agreement between White Front Stores, Inc. ("White Front"), and Francis J. Esgro, dated December 1, 1962.

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2. Amendment to Agreement and License Agreements, dated November 29, 1963.

3. License Agreement - Jewelry, cameras and photographic equipment; unsigned; dated , 1963.

4. License Agreement - Sale of liquor and gourmet foods; unsigned; dated , 1963.

5. Second Amendment to Agreement and License Agreements, dated May 18, 1964.

6. Third Amendment to Agreement and License Agreements, dated July 21, 1964.

7. Fourth Amendment to Agreement and License Agreements, dated July 18, 1968.

8. Option Agreement, dated July 15, 1968.

9. Amendment to Fourth Amendment to Agreement and License Agreements, dated February 28, 1969.

10. Amendment to Agreement and License Agreements Relating to Operation of Jewelry and Camera Departments in Pacific Northwest Stores, California and other Western States, dated December 1, 1970.

11. Letter from Harry Epstein to Francis J. Esgro, dated January 15, 1971.

12. Amendment to Agreement and License Agreements Relating to Liquor Departments, dated December 1, 1970.

13. Amendment to Agreement and License Agreements Relating to Operation of Residential Interior Departments, dated December 1, 1970.

14. Residential Interiors License Agreement; unsigned; undated.

15. Amendment to Agreement and License Agreements Relating to Operation of Bedding Departments, dated March 6, 1971.

16. License Agreement - Bedding Departments; unsigned; undated.

17. Memorandum - Esgro, Inc. ("Esgro") - White Front, dated July 10, 1971.

18. Letter dated July 7, 1971 supplementing Amendment to Agreement and License Agreements Relating to Operation of Residential Interior Departments.

19. Letter dated August 13, 1971 from White Front to Esgro, concerning Long Beach Store - Residential Interiors.

20. Sixth Amendment to Agreement and License Agreements Relating to Liquor Departments, dated June 29, 1972.

21. The complaint of White Front filed on February 15, 1973 in the Superior Court of the State of California (the "California Lawsuit").

22. The answer of Esgro and various others in the California Lawsuit.

23. Esgro's cross-complaint in the California Lawsuit.

24. White Front's answer to Esgro's cross-complaint.

25. White Front's proof of claim in Esgro's Chapter XI case.

26. White Front's amended proof of claim in Esgro's Chapter XI case.

27. Order of the United States District Court for the Central District of California (the "California Bankruptcy Court") entered on May 7, 1973.

28. The California Bankruptcy Court's memorandum opinion of January 23, 1974.

29. Esgro's proof of claim (Claim No. 7273A) in the Defendants' Chapter X case.

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30. Order of the United States District Court for the Southern District of New York fixing the date for filing of claims in Defendants' Chapter X case.

31. Trustees' objection to Esgro's claim (Claim No. 7273A).

It is further stipulated and agreed to by and between the undersigned that any objections to the introduction into evidence in the within adversary proceeding of said documents are hereby waived.

Dated: New York, New York
May 21, 1976

WEIL, GOTSHAL & MANGES
Attorneys for Irving Sulmeyer, as Receiver for the Chapter XI Estate of Esgro, Inc.
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

By__________________________

SHEA, GOULD, CLIMENKO, KRAMER & CASEY
Attorneys for Joseph R. Crowley and Herbert B. Siegel, Reorganization Trustees
330 Madison Avenue
New York, New York 10017
(212) 661-3200

By__________________________

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A 322

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGROL INC., a Debtor in Chapter XI,

Plaintiff,

-v-

JOSEPH R. CROWLEY, et al.,

Defendants.

Reorganization Nos.
74 B 614-802

ORDER

Plaintiff having instituted an adversary proceeding pursuant to Rule 10-601 by filing a complaint seeking, inter alia, modification of this Court's stay of suits as contained in its June 13, 1974 order as amended by an Order dated October 20, 1975 so as to permit the prosecution by plaintiff of a certain cross complaint presently pending in an action commenced against Esgro, Inc., and others by White Front Stores, Inc. and others in the Superior Court of the State of California, County of Los Angeles (No. C50105) (the "California Proceedings");

AND, issue having been joined, this Court having held a trial on May 21, 1976 and having considered all of the evidence presented by the respective parties at said trial and having also heard the Securities and Exchange Commission and Zalkin Rodin & Goodman, attorneys for the debtors' institutional lenders, in opposition to the relief demanded in the complaint; it is hereby

The next page is A334.

ORDERED, that the stay of suits contained in this Court's June 13, 1974 order, as amended, be and the same hereby is modified ~~but only to the extent indicated herein~~; and it is further

ORDERED, that all parties to the instant proceeding be, and they hereby are, directed at the earliest possible time to make an appropriate application to the Superior Court of the State of California, County of Los Angeles seeking an order advancing the trial date so as to obtain the earliest possible trial of the California Proceedings; and it is further

ORDERED, that all discovery and other pre-trial proceedings in both the proceeding instituted herein by the Trustees on their application to expunge Claim 7273A of Esgro, Inc., (the "Trustees' Proceeding"), to the extent ~~currently~~ heretofore noticed or planned, and in the California Proceedings be conducted and completed on an expedited basis; and it is further

ORDERED, that all discovery and all pretrial proceedings, including but not limited to requests for admissions, either heretofore or hereafter commenced in either the Trustees' Proceeding or in the California Proceedings, may be used in both of said proceedings, both parties having heretofore agreed to this provision of this order; and it is further

ORDERED, that the parties report to the Court on or before July 8, 1976 for the purpose of advising the Court as to the progress of discovery proceedings and the result of their application to the California Superior Court for an order advancing the trial date of the California Proceedings; and it is further

ORDERED, that, except to the extent otherwise indicated herein, the relief requested in the complaint herein be and the same hereby is denied in all respects.

Dated: New York, New York
May 26, 1976.

/s/ Edward J. Ryan
Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Reorganization Nos.
74 B 614-802,
Inclusive

In Re

INTERSTATE STORES, INC., formerly
known as INTERSTATE DEPARTMENT
STORES, INC., et al.,

Debtors.

ORDER TO SHOW CAUSE

Upon the annexed affidavit of Daniel L. Carroll, sworn to June 3, 1976, and sufficient cause appearing therefor, it is

ORDERED, that the claimant, Esgro, Inc., show cause before the Honorable Edward J. Ryan, Bankruptcy Judge, at the United States Court House, Foley Square, New York, New York, Room 236, on the day of June, 1976 at o'clock, or as soon thereafter as counsel can be heard, why an order should not be entered herein pursuant to Rule 737 of the Rules of Bankruptcy Procedure and Rule 37(d) of the Federal Rules of Civil Procedure, striking Claim No. 7273A of Esgro, Inc. and directing Esgro, Inc. to pay the reasonable expenses of the Trustees, including attorneys' fees, incurred in connection with this motion, upon the ground that Esgro, Inc. has failed and refused to appear for the deposition upon oral examination heretofore noticed by the Trustees by notice dated April 9, 1976, and for such other and further relief as to the Court may seem just and proper; and it is further

ORDERED, that personal service of a copy of this order and the papers upon which it was granted upon Messrs. Weil, Gotshal & Manges, attorneys for Irving Sulmeyer, Receiver for the estate of Esgro, Inc., on or before June , 1976 at P. M.

and service by mail upon Richard C. Greenberg, DeMarco, Barger, Beral, attorneys for Irving Sulmeyer, Receiver for the estate of Esgro, Inc. and Joseph Bernfeld, Esq. and Gibson, Dunn & Crutcher, attorneys for Esgro, Inc., on or before June , 1976 shall be deemed good and sufficient service.

Dated: New York, New York
June , 1976

Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X
In Re :
INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., :
Debtors. :
- -X

Reorganization Nos.
74 B 614-802,
Inclusive

AFFIDAVIT

STATE OF NEW YORK)
.: ss.:
COUNTY OF NEW YORK)

DANIEL L. CARROLL, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Shea Gould Climenko Kramer & Casey, attorneys for the Trustees in the above referred to matter. I make this affidavit in support of the Trustees' motion for an order striking Claim No. 7273A of Esgro, Inc. pursuant to Rule 737 of the Rules of Bankruptcy Procedure and Rule 37(d) of the Federal Rules of Civil Procedure. This motion is based on Esgro, Inc.'s failure and refusal to appear for a deposition originally noticed for May 24, 1976 and adjourned by consent to June 2, 1976.

2. On April 9, 1976, an application seeking to expunge Claim No. 7273A of Esgro, Inc. was filed and served. The application was returnable June 13, 1976. Concurrent with the service of that application, various discovery proceedings were instituted by the Trustees, including the service of Interrogatories and a Notice to Admit. At the same time, a notice to take the deposition of Esgro, Inc. by Francis J. Esgro, its President, was served, setting the deposition for May 24, 1976.

3. On April 28, 1976, I received a telephone call from Lawrence Mittman of Weil, Gotshal & Manges. Mr. Mittman indicated that his firm would be representing Esgro, Inc. in connection with the Trustees' application to expunge Claim No. 7273A and requested an adjournment of the various discovery proceedings. I told Mr. Mittman that I would agree to an adjournment but that because of the importance of the application and the need to obtain an expeditious adjudication of Esgro, Inc.'s claim, I would agree to only a short adjournment. After some discussion, I agreed to a two week extension of time for Esgro, Inc. to respond to the Interrogatories and the Notice to Admit, upon the condition that no further adjournments would be requested. I also agreed to a two week adjournment of Mr. Esgro's deposition, i.e., to June 2, 1976. Following my conversation with Mr. Mittman, I prepared a stipulation setting forth the agreement reached and forwarded it to him for signature. A copy of my April 29, 1976 letter, as well as the stipulation, is annexed hereto as Exhibit A. I am informed that a few days later Mr. Mittman called Lester Yassky of my firm and told him that, despite his prior agreement to the matters set forth in the stipulation, the stipulation would not be signed.

Mittman
didn't agree -
otherwise -
"I'll have
to check it
out."

4. On May 11, 1976, Esgro, Inc. served a summons and complaint under Rule 10-601 for modification of this Court's stay as contained in its June 13, 1974 order. The complaint sought judgment modifying the stay so as to permit Esgro, Inc. to proceed with the cross-complaint asserted in an action pending in the California Superior Court (the "California lawsuit"), dismissing the Trustees' objection to the allowance of Esgro, Inc.'s claim and enjoining the Trustees from commencing or continuing

with pre-trial discovery before this Court. At the same time, a temporary restraining order which would have stayed pre-trial discovery previously commenced by the Trustees was presented to the Court for signature. At the hearing on May 11, 1976, the Court declined to enter an order staying discovery but directed that the trial of Esgro, Inc.'s complaint be had on May 21, 1976.

Implicit that no discovery until trial of [illegible] pending

5. On May 21, 1976, the trial on Esgro, Inc.'s complaint commenced. Esgro, Inc. presented evidence through its California counsel, Arthur Sherwood of Gibson Dunn & Crutcher, to the effect that a trial of the California lawsuit could be had in the California Superior Court within approximately eight months, *provided* the California Court granted a motion for an order advancing the trial date. Mr. Sherwood also testified that it was Esgro, Inc.'s intention, as well as his, to get the California lawsuit to trial as expeditiously as possible. The Trustees presented evidence, which was uncontradicted, demonstrating that it was necessary to obtain an adjudication of Esgro, Inc.'s claim before any feasible plan of reorganization could be formulated and that the pendency of Esgro, Inc.'s claim No. 7273A was the only real impediment to the formulation of such a plan.

What about other [illegible]

Plan [illegible] ([illegible])

6. On May 26, 1976, this Court signed an order modifying the stay of suits contained in the June 13, 1974 order so as to permit the parties to make an appropriate application to the Superior Court of the State of California seeking an order advancing the trial date of the California lawsuit. That order also provided "that all discovery and other pre-trial proceedings in both the proceeding instituted herein by the Trustees on their application to expunge Claim 7273A of Esgro, Inc. ... to the extent heretofore noticed or served and in the California Proceed-

court modified so as to permit Calif. Counsel to proceed & parties to hold discovery ings be conducted and completed on an expedited basis." During the course of the proceedings, the Court was informed by Esgro, Inc.'s attorneys that the reason Esgro, Inc. had not pressed its counterclaim in the California lawsuit was that its Chapter XI proceeding required its full attention but that there was now no reason why discovery could not proceed on an expeditious basis in that an order had just been entered by the California Bankruptcy Court approving Esgro, Inc.'s plan of arrangement.

[illegible] that [illegible] at this Court's convenience

7. On May 27, 1976, I had a telephone conversation with Mr. Sherwood of Gibson Dunn & Crutcher in an attempt to set up a discovery schedule. I reminded Mr. Sherwood of the deposition of Mr. Esgro scheduled for the following Wednesday, June 2nd, and asked him if Mr. Esgro would be appearing for that deposition. Mr. Sherwood replied that he would have to check on Mr. Esgro's availability and get back to me. I note that although Mr. Esgro's deposition had been noticed for New York, we had, in order to accommodate Mr. Esgro, agreed to take the deposition in California.

It was clear at [illegible] argument that schedule of dep would be arranged to suit mutual convenience of parties + witnesses

8. Not having heard from Mr. Sherwood, I called him on Friday afternoon, May 28, 1976, and was informed by him that Mr. Esgro would not be available for his deposition until the first week in July. Mr. Sherwood explained that the funding of Esgro, Inc.'s Chapter XI plan was set for closing at the end of June and that Mr. Esgro would be forced to spend his time attending to the details of the closing, including the funding of the plan. I told Mr. Sherwood that we wished to proceed with Mr. Esgro's deposition before the first week in July. Again, in order to accommodate Mr. Esgro, I suggested that we might be able to at least begin Mr. Esgro's deposition by proceeding for a day or two early in the week of June 7th. I explained to Mr. Sherwood that in this way I

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could proceed with the deposition of two witnesses, Mr. Epstein and Mr. Wood, which had also previously been noticed, but that I did not wish to proceed with these depositions until I had at least commenced the deposition of Mr. Esgro. Mr. Sherwood responded that he would speak with Mr. Esgro about this possibility and would get back to me. By letter dated May 28, 1976, Mr. Sherwood confirmed this conversation stating that he would check Mr. Esgro's availability for early June and stated "early July would be available in any event."*

9. On June 1, 1976, I called Mr. Sherwood but he had not been able to reach Mr. Esgro and, therefore, could not give me an answer with respect to Mr. Esgro's availability in early June. On June 2, 1976, Mr. Sherwood called and told me that, despite his earlier assurances that Mr. Esgro would in any event be available the first week in July, he would not now be available for the deposition until the week of July 26th. I informed Mr. Sherwood that this was unacceptable and that we would have to take whatever action we deemed appropriate.

Sherwood says Cavell was supposed to call him back.

10. I respectfully suggest that the above recited facts demonstrate that our apprehension with respect to the delays that would be encountered should the stay be lifted were fully justified. The most important discovery to be had in this case is the deposition of Mr. Esgro. However, we are now being asked to wait almost two months before even commencing that deposition. In view of the importance to the estate of an early adjudication of Esgro, Inc.'s claim, as demonstrated by uncontradicted evidence

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*Mr. Sherwood's letter was not entirely accurate in summarizing the various conversations, but I will not go into detail in this regard in that said details are not relevant to this application.

at the May 21, 1976 trial, and in view of the importance of Mr. Esgro's deposition to such an early adjudication, I respectfully submit that the delays now being encountered are inexcusable and should not be countenanced by this Court. Esgro, Inc.'s apparent indifference in proceeding expeditiously with the adjudication of its $38,000,000 claim warrants, I respectfully submit, the relief requested and I, therefore, request that the instant motion be granted in all respects.

Daniel L. Carroll

Sworn to before me this
3rd day of June, 1976.

Philip R. Mann
Notary Public

PHILIP R. MANN
Notary Public, State of New York
No. 31-7658960
Qualified in New York County
Commission Expires March 30, 1978

April 29, 1976

Lawrence Mittman, Esq.
Weil Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Re: Interstate Stores -
Esgro Inc., Claim

Dear Larry:

In accordance with our telephone conversation yesterday, I am enclosing the original and two copies of a stipulation adjourning the various discovery proceedings relative to the above-referred to matter. Please sign and return the original and one copy to me.

Sincerely,

Daniel L. Carroll

DLC:ceb

Enclosures

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

------------------------------------x

In re

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,

Debtors.

------------------------------------x

Reorganization
Nos. 74 B 614-802
Inclusive

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys that:

(a) The time for claimant Esgro, Inc., to respond to the Interrogatories To Claimant Esgro, Inc., (Claim No. 7273A) dated April 9, 1976 is extended to and including May 24, 1976 and that claimant Esgro, Inc., will not request any further adjournment of the time to respond to said interrogatories.

(b) The time for claimant Esgro, Inc., to respond to the Notice To Admit dated April 9, 1976 is extended to and including May 24, 1976 and that claimant Esgro, Inc., will not request any further adjournment of the time to respond to said Notice To Admit.

(c) The deposition of Esgro, Inc., by Francis J. Esgro noticed for May 24, 1976 is adjourned to June 2, 1976 at the same time and place set forth in the Notice To Take Deposition dated April 9, 1976.

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Dated: New York, New York

April 1976

WEIL COTSHAL & MANGES

By:________________________
A Member of the Firm
Attorneys for Claimant
Esgro, Inc.
767 Fifth Avenue
New York, New York 10022

SHEA GOULD CLIMENKO KRAMER & CASEY

By:________________________
A Member of the Firm
Attorneys for Trustees
330 Madison Avenue
New York, New York 10017

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A346

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

- -x

In Re: :

INTERSTATE STORES, INC., et al., :

Debtors, :

- against - :

IRVING SULMEYER, as receiver for :
the Estate of ESGRO, INC., a
Debtor in Chapter XI, :

- against - :

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, :
et al., :

Defendants. :

- -x

U.S. Courthouse
Foley Square
New York, New York

June 4, 1976
10 o'clock, a.m.

BEFORE:

HON. EDWARD J. RYAN,

Bankruptcy Judge

APPEARANCES:

SHEA, GOULD, CLIMENKO, KRAMER & CASEY, ESQS.,
Attorneys for Trustees,
330 Madison Avenue
New York, New York

BY: LESTER YASSKY, Esq., of Counsel.

WEIL, GOTSHAL & MANGES, ESQS.,
Attorneys for Plaintiff, Esgro, Inc.,
767 Fifth Avenue
New York, New York

BY: BRUCE ZIRINSKY, Esq., of Counsel
- and -
LAWRENCE MITTMAN, Esq., of Counsel.

SECURITIES AND EXCHANGE COMMISSION
26 Federal Plaza
New York, New York

BY: MERYL WIENER, of counsel.

- - -

MR. ZIRINSKY: Your Honor, I am not quite sure why we are here this morning. I do have some papers that were sent to my office yesterday afternoon by Shea, Gould, Attorneys for the trustee.

THE JUDGE: You have read them?

MR. ZIRINSKY: Yes, I have read them, Your Honor.

THE JUDGE: You were informed by counsel that in lieu of having an order to show cause executed, served, et cetera, I suggested he simply call you so that we can discuss what to me is an extraordinarily simply problem.

Why can't Mr. Esgro be deposed before July 29th. Before I go back to you, Mr. Zirinsky, is this what we are here for?

MR. YASSKY: Yes, Your Honor.

THE JUDGE: Mr. Zirinsky, please tell me something about Mr. Esgro. What does the man do for a living?

MR. ZIRINSKY: Your Honor, one of the points I would like to make right now is that --

THE JUDGE: First, do you know now why we are here?

MR. ZIRINSKY: I'had a sneaking suspicion why we are here. I must question the procedure that's been employed here.

THE JUDGE: If you want, fine. If you want me to direct Mr. Yassky to go back to his office and we will get these papers put into some other shape, have you served and then bring you back on that -- is this the procedure you question?

MR. ZIRINSKY: Your Honor, there is Rule 37 of the Federal Rules of Civil Procedure.

THE JUDGE: There is a rather overriding consideration called common sense. Busy people don't go around making a lot of paper work for no useful purpose. I would apologize if you got the impression that this was a command performance here this morning.

If you had other more urgent matters, I would have assumed you would have told Mr. Yassky and we could have set up a date at somebody else's convenience -- at everybody's convenience.

Is this extraordinarily inconvenient for you this morning?

MR. ZIRINSKY: There are other pressing matters in my office that I am engaged in.

THE JUDGE: I am sure you have another case in the office. This is one that is of a great magnitude. I see no need to rehash even in court the trial of -- your complain to have this case tried in California.

MR. ZIRINSKY: Your Honor, the other thing I would like to mention is the fact that --

THE JUDGE: No.

MR. ZIRINSKY: I am getting to the merits now.

THE JUDGE: You may put anything you wish on the record.

Off the record.

(Discussion off the record.)

MR. ZIRINSKY: I would like to make a statement for the record.

THE JUDGE: Yes, please do.

MR. ZIRINSKY: Your Honor, I would like to say first of all that I believe that the application of the trustees today is predictable.

THE JUDGE: Is what?

MR. ZIRINSKY: Predictable.

I believe -- I anticipated this at the trial. Ibelieve the record will so reflect.

It represents an attempt to obtain today by fabricationwhat could not be obtained at the trial on the merits.

Moreover, Your Honor, it is a shining example of an apparent belief that merely by wrapping themselves in the flag of equity, the trustees can impose upon this court and run roughshod over the rights of third parties in disregard of due process of law.

Item one, Your Honor, this motion was brought in less than a day's notice. We were served with unsigned -- an unsigned order to show cause.

THE JUDGE: At my suggestion.

MR. ZIRINSKY: Your Honor, Rule 9 of the local rules of this court requires that any proceeding brought on by order to show cause shall be supported by an affidavit clearly and distinctly setting forth the reasons why notice of motion would not be adequate.

Your Honor, the conversations, the discussions, with regard to discovery, which are the subject matter of this application, involve discussions between Mr. Carroll of Shea, Gould and Mr. Sherwood of Gibson, Dunn &

Crutcher who happens to reside in Los Angeles, and it is impossible for him to be here today to respond to certain of the statements that are made in Mr. Carroll's affidavit and certain other statements which I assume will be made by counsel here today.

I believe that it is in an improvident manner, if not a totally invalid manner, of bringing on a motion before this court.

THE JUDGE: Mr. Zirinsky, if you really feel that way, I will be glad to get on the phone and I will call Mr. Underwood and ask him why Mr. Esgro can't be deposed.

If I can't get an answer from you, I will get it from Mr. Underwood. I don't think there is any impropriety in that.

MR. ZIRINSKY: It is not a question of why Mr. Esgro can't be deposed.

THE JUDGE: What do you view as the issue before the court at the present time?

MR. ZIRINSKY: The only issue before the court at the present time is the fact that Mr. Sherwood has indicated to Mr. Carroll that it is very difficult for Mr. Esgro to commit himself for weeks of deposition, preparation for deposition and deposition before the middle or the end of July.

There is other discovery taking place, Your Honor. There are two other depositions which can go forward and which were scheduled, I understand, to go forward in Los Angeles next week. We are responding to their interrogatories.

We are responding to their notice to admit. We have commenced our own discovery. We have served our own interrogatories.

Your Honor, I think it is a shame --

THE JUDGE: Now, we are getting into something pertinent as to what is before me.

MR. ZIRINSKY: I think it is a shame. The trustees and their counsel are seizing upon the flimsiest of excuses to come back to this court and once again try and get a second bit at the apple.

It happened last week, Your Honor, at the settlement of the order. Your Honor made it very clear at the conclusion of the trial on the merits, you made it very clear last week at the summation argument and the settlement of the order, what your intentions were.

The trustees proffered a proposed order, Your Honor, in an effort to be or an effort not to bicker --

THE JUDGE: If I am correct, Mr. Underwood said there are a hundred some odd attorneys in the firm, sixty-two some odd are litigators.

I tried to assure myself and I think he did respond in the affirmative that his firm could give this case immediate attention.

I still don't have any answer to the question. What precludes the examination of Mr. Esgro very soon. If you don't know, please call Mr. Underwood and find out.

MR. ZIRINSKY: Mr. Sherwood, Your Honor. I am told by Mr. Sherwood -- I did have the opportunity to speak to him briefly late yesterday afternoon. He advised me that Mr. Esgro who is the president of Esgro, Inc., which is a company in Chapter XI -- there was an order of confirmation signed a couple of weeks ago. The order by its own terms doesnot become final until a deposit has been made for the payment of creditors.

Mr. Esgro is engaged in negotiations for the procurement of financing of that plan, has anticipated there will be a closing on that plan sometime late this month, the month of June.

Mr. Esgro, in order to be prepared at a deposition, in order for the deposition to be fruitful for all purposes, needs time to prepare. He needs time to review his own papers, his own documents, refresh his own memory.

These are all events that took place back in 1972, approximately four years ago. It will take at least two or three days for Mr. Esgro to do this. He then has to set aside, according to the trustees, at least three days solid to be deposed.

So, Your Honor, you are talking about a minimum commitment of a solid week, and all we are saying is that Mr. Esgro -- it is essential that -- that the financing be procured, the deposit be made, and that is all supposed to happen at the end of this month.

As to why Mr. Esgro is not available earlier in July as opposed to later in July, frankly, Your Honor, I believe if Mr. Sherwood, so to speak, leans on Mr. Esgro and tells him that it is important that he be there, I am very confident that Mr. Esgro will be prepared to be deposed.

In the month of July, furthermore, Your Honor, Mr. Sherwood disputes certain of the matters set forth in Mr. Carroll's affidavit. Mr. Sherwood has denied to me on the telephone -- and Your Honor has had Mr. Sherwood before you, I think Your Honor knows him to be a credible person -- Mr. Sherwood denies having said to Mr. Carroll or having left a discussion, a telephone discussion with Mr. Carroll, to the effect that it's going to be July 26th or not, et cetera.

The understanding at the end of that phone conversation was that Mr. Carroll was supposed to get back, call back, Mr. Sherwood. They were still discussing the scheduling of the deposition. There was no finality on either side. It wasn't as if the parties had reached a point where they could not possibly agree.

That is what I am told by Mr.Sherwood, Your Honor. That is contrary to the matters set forth in Mr. Carroll's affidavit.

Unfortunately --

THE JUDGE: All of which is rather really irrelevant to what I have before me, that is, the question when can Mr. Esgro be deposed at the earliest possible time.

I really doubt that the man spends nine to five five days a week sitting worrying about the financing of the plan.

My question to you was what does the man do for a living? Is he engaged in a number of different activities that keeps him going on a day by day basis?

MR. ZIRINSKY: I believe so, Your Honor. Perhaps Mr. Mittman can speak to that.

MR. MITTMAN: I am informed by California counsel that Mr. Esgro is engaged in other businesses besides the ones that are in Chapter XI or the ones coming out of Chapter XI.

I also think that some of the businesses are located in the midwest. I am not quite certain but I know that he is chairman of certain corporations, other corporations, which are not in Chapter XI.

MR. ZIRINSKY: Your Honor, I would also like to inquire. It was my distinct impression and understanding at the conclusion of the trial last week that discovery -- I am being very candid about this -- discovery was supposed to --

THE JUDGE: Anything an attorney says in my court is in candor, Mr. Zirinsky.

MR. ZIRINSKY: It was my distinct impression, Your Honor, despite the ambiguity of the order that was entered -- it was my distinct impression that discovery was to

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proceed under the auspices of the California court. That the only stipulation Your Honor has with regard to the fact that discovery, which had heretofore been served or noticed, could be used without having to refile or reserve it or renotice it and unfortunately we don't have a copy of the transcript of last week's summation argument and the settlement of the order.

So I can't refer to anything to point that out.

THE JUDGE: I can hand over the order to you if that will help refresh your recollection unless you have a copy of it in front of you.

MR. ZIRINSKY: Your Honor, I distinctly recall and I believe Your Honor will recall that we submitted an order and the trustee's counsel submitted an order.

THE JUDGE: I referred to the third order on page 2. Three notices of taking depositions had been served, correct, including Mr. Esgro in connection with the

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objection to claim, is that not so, Mr. Yassky?

MR. YASSKY: That's correct, Your Honor.

THE JUDGE: It was agreed that Mr. Esgro would be deposed in California. I have a recollection that we began to get down to the nitty gritty and I felt that the two attorneys in California would work it out between themselves.

MR. ZIRINSKY: Precisely, Your Honor.

Now we have a motion before us asking the court to strike a proof of claim because Mr. Esgro has failed to give discovery. I believe that he is --

THE JUDGE: Allright. Now, my question is the same one that I posed before.

What is the earliest date that Mr. Esgro can put aside this approximate one week period to turn his mind to his huge claim so that he can be deposed with respect thereto?

I think it is this simple.

MR. ZIRINSKY: Your Honor, I believe

and I must speak to Mr. Sherwood --

THE JUDGE: If you do not know, say you do not know.

MR. ZIRINSKY: I don't know. I know Mr. Sherwood indicated that if absolutely essential Mr. Esgro could probably be available the first half of the month of July.

THE JUDGE: All right, Mr. Yassky, this is your motion.

MR. YASSKY: I would just like to take a few moments, Your Honor, to recapitulate some chronology here although I think Your Honor is fully aware of everything that has happened to date.

We started this on April 9th with a notice to depose Mr. Esgro. He was scheduled for a deposition, I believe, around May 9th. There was an agreement to extend that for two weeks. That agreement was not concluded.

Your Honor is aware of the actions taken by the receiver and their counsel in an attempt to move this matter to California.

The agreement was to have the

deposition on June 2nd, Your Honor, here in New York as indicated on the notice.

As a matter of convenience to Mr. Esgro, we agreed to go out to California to do that and when we left Your Honor's chambers on May 21st and then again on May 26th, I believe, Your Honor's courtroom, it was certainly my clear understanding that we would arrange to hold his deposition on June 2nd or at a convenient date, thereabouts, at Mr. Esgro's convenience, us going out there to do it.

Then the facts are set forth in Mr. Carroll's affidavit. We come now to during the week of July 26th would be the first time that Mr. Esgro would be available.

Mr. Esgro has made this $38 million claim in this proceeding. Your Honor is already fully aware of the importance of this claim on the continuing reorganization.

We asked as Your Honor asks why this man can't make himself available at an early reasonable date so we can go forward with the procedures that have been established here.

Mr. Carroll said he would limit his deposition to two days out there and adjourn it if it is necessary. We would work out a time. If Mr. Esgro is so busy, we will start at 11 o'clock in the morning, give him a couple of hours to make his phone calls and do what he has to do.

Your Honor, with your experience, I am sure you realize I spent ten years practicing corporate law. I am fully aware of all these huge corporate transactions, how they gauge time of clients. If anyone's time is full spent on these matters, it may be the attorneys, but the clients certainly can make themselves available sometime within a period of two months for something of this importance.

THE JUDGE: I gather from what Mr. Zirinsky said Mr. Esgro can be made available in the first two weeks of July.

Is this a fair statement?

MR. ZIRINSKY: That is what Mr. Sherwood

has indicated to me, Your Honor, yes.

May 24th becomes June 2nd which becomes the middle of July, Your Honor. Your Honor's order asked us to report back before you by July 8th to tell you what is happening in this matter.

THE JUDGE: Unfortunately for some reason we don't have Mr. Carroll here. He is the man who made the statement in his affidavit.

MR. YASSKY: Mr. Carroll is on trial or as of 8 o'clock last night still believed he was on trial in the State Court. I have consulted with Mr. Carroll personally as to every allegation that he has set forth in his affidavit. He has an office two doors down from me and I can attest to everything that he's said in this affidavit.

THE JUDGE: It's rather difficult to really get the full thrust of Mr. Carroll's position. Is he happy with the first week of July or the second week of July? It would appear that way from paragraph 9 of page 5.

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MR. YASSKY: We are not happy with the first week in July, Your Honor.

THE JUDGE: Pardon me. I withdraw the happy.

MR. YASSKY: I certainly can speak for Mr. Carroll and speak for the client in this matter, the trustees. I don't see any reason, Your Honor, why June 2nd would become July 2nd.

THE JUDGE: No, but Mr. Carroll apparently in his conversations with Mr. Sherwood -- let me quote, On June 2, 1976 Mr. Sherwood called and told me that despite his earlier assurances, that Mr. Esgro would, in any event, be available the first week in July, he would not now be available for the deposition until the week of July 26th.

MR. YASSKY: That is just stating what Mr. Sherwood said, Your Honor.

THE JUDGE: No, but the implication to me is that Mr. Carroll had received "earlier assurances" with respect to the first week in July.

MR. YASSKY: I can certainly speak to what I think Your Honor is reading the implication in that. It was never agreeable to Mr. Carroll or to the trustees here to have it in the first week in July. This -- the purpose of that sentence included here is just showing what has happened in the conversations with Mr. Sherwood.

He says that it will first be in the first week in July but now it's the last week in July.

In other words, it's a pattern. He will get back to us, he will tell us, never anything firm, extended, extended, until it's the last week in July.

I can tell you that the way it was left with Mr. Sherwood and Mr. Carroll according to Mr. Carroll's conversation with me, is that Mr. Sherwood said the first week in July is the first time he is available.

Mr. Carroll says that's not acceptable. Mr. Sherwood says that's all I can do. It's not Mr. Sherwood that we are deposing. There are no allegations here that Mr. Sherwood with his hundred plus firm is in any way dilatory or anything. He has acted courteous.

He has gotten back to us on the phone. We have called him. The three-hour delay and all that -- but his client is not cooperating, Your Honor.

MR. ZIRINSKY: I believe, Your Honor, if Mr. Yassky is going to testify here as to these matters, I believe that it is important that the court recognize that it is all hearsay. He is going based upon what Mr. Carroll told him.

THE JUDGE: I didn't recognize that, Mr. Zirinsky.

MR. ZIRINSKY: I have here with me, Your Honor, a letter dated May 28, 1976, addressed to Mr. Holtzman, who is California counsel to the trustee.

THE JUDGE: Has an application been made out there --

MR. ZIRINSKY: That is another point, Your Honor.

THE JUDGE: Has an application been made out there for the preference?

MR. ZIRINSKY: Your Honor, the trustee's counsel are supposed to prepare a draft and submit it to Mr. Sherwood. They have yet to do so.

THE JUDGE: That is in the works.

MR. ZIRINSKY: I assume so. That is the most essential link, Your Honor.

THE JUDGE: Do we know whether under California practice it is possible to obtain a master to supervise discovery? Do we know? Do you know?

MR. ZIRINSKY: I don't know for sure.

THE JUDGE: Do you know, Mr. Yassky?

MR. YASSKY: No, I don't.

THE JUDGE: Let's find out.

MR. ZIRINSKY: In Mr. Sherwood's letter it is set forth they were also going to ask that the matter be submitted to one judge for all purposes in the Superior Court and I would assume that that judge would be the one to supervise discovery in the action.

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Your Honor, I would like to show this to Your Honor so Your Honor could see --

THE JUDGE: It is not necessary.

MR. YASSKY: Your Honor, I believe that this court certainly has jurisdiction in this matter and certainly has enough familiarity with this matter, much more so than any California judge at this time, that this court can order Mr. Esgro's deposition to be held within a two-week period of time, at Mr. Esgro's convenience.

I can stipulate to any date within the next two weeks and if he doesn't appear then, then a strike is claimed in this matter.

MS. WIENER: Excuse me, Your Honor. I think we are losing sight of the forest here from the trees. When we left here last -- whenever, May, two weeks ago, when the hearing was held, it was an impression that I got, anyway, of cooperation between the parties.

That this matter would be expedited, and here we are approximately two weeks later and we are still arguing over a convenient date for deposing the one person who is the key to the subsequent depositions that need to be taken.

Mr. Carroll so states it in his --

THE JUDGE: Mr. Carroll also states that he prefers to depose other persons; isn't that true?

MS. WIENER: As well but he says that he prefers --

MR. ZIRINSKY: Your Honor, may I make a request at this point?

May I request --

MS. WIENER: You are interrupting.

MR. ZIRINSKY: I am a party here.

MS. WIENER: So am I.

THE JUDGE: Mr. Zirinsky, please let Miss Wiener finish.

MS. WIENER: Page 5 of Mr. Carroll's affidavit, the third line in paragraph 8 -- second line, I don't wish to proceed with these depositions until I have at least commenced the deposition of Mr. Esgro.

Suddenly, Your Honor, this whole

matter is taking on a different tone --

THE JUDGE: Yes.

MS. WIENER: (Continuing.) -- as was stated by Professor Crowley when he was on the stand, by Mr. Yassky and by myself.

The settlement of this claim is crucial to the estate. I think that every effort should be made to depose Mr. -- to see that Mr. Esgro is deposed as quickly as possible.

MR. ZIRINSKY: Your Honor, I am quite perplexed by this procedure.

THE JUDGE: Maybe your perplexity can in part be resolved by the fact that I recognize a large part of our problem results from the fact that the trustees have chosen to use a New York attorney to try this case.

MR. ZIRINSKY: That is their decision, Your Honor.

THE JUDGE: If Mr. Carroll were not in charge of the Esgro matter, all of this would be fought out between the attorneys for the respective parties in California.

MR. ZIRINSKY: It would be fought out to an amicable solution?

THE JUDGE: I can never be sure of that.

MR. ZIRINSKY: For some reason Mr. Carroll wishes must be given the words of law.

THE JUDGE: I don't even have Mr. Carroll here to tell me what was the thrust and the substance of his discussion with the attorney for Esgro in California.

MR. ZIRINSKY: Nor do we have the attorney for Esgro in California.

THE JUDGE: For these discovery motions I am not going to ask an attorney to come in from California so we can line up depositions. To me this matter should be litigated in California.

MR. ZIRINSKY: Your Honor, I would request that the court clarify that. That was my impression last week.

THE JUDGE: This is one of the purposes that prompted me to yield to Mr. Yassky's request for an immediate hearing of this matter.

MR. YASSKY: Your Honor, I repeat, I see no reason why Mr. Esgro, who has made this $38 million claim,cannot be ordered at any time within his convenience between the next two or three weeks to be available for a deposition.

THE JUDGE: What would you profess be done if Mr. Esgro begins to raise objections on the taking of his deposition? Are we going to try those objections here?

MR. YASSKY: If that happens, Your Honor --

THE JUDGE: Go a little further from where we are now.

MR. YASSKY: If we see there is going to be a continuation of delay in this matter, I intend to bring it to this court's attention. This court is the court that has the most concern about this reorganization. Three and four month delays on a claim of this magnitude which is essential to this reorganization -- and, yes, I intend to bring it to the attention of this court for Your Honor's discretion.

MR. ZIRINSKY: Your Honor, I would like to remind the court that at the trial Mr. Sherwood estimated -- and it is in the transcript, I can point the court to it -- he estimated at that time it would take approximately four months to complete discovery.

Your Honor, we are not saying we are not going to complete it within four months. Nothing has changed. What we have here, everything apparently is going smoothly.

One problem, one slight disagreement between counsel as to the scheduling of one deposition, and the trustees are back here seeking, Your Honor, what I consider to be totally unwarranted relief to strike a claim.

There has never been an order entered by this court compelling discovery. This is a totally frivolous motion that they have made here.

It seems to me, Your Honor, the trustees and their counsel are basically -- they feel this is the mst sympathetic court for them.

THE JUDGE: So far I don't think that would be a sound conclusion. At least, with respect to this particular phase of the reorganization.

MR. ZIRINSKY: Your Honor, we are cooperating. I would like to pose to Mr. Yassky one question.

Mr. Yassky, don't you think that if we wanted to play dirty pool we could file an objection to your claim in the California Bankruptcy Court, assert our counterclaims in the California Bankruptcy Court and force you into the California Bankruptcy Court?

You submitted to jurisdiction there. The point is we did not assert or we did not attempt to push it because we felt at that time California Superior Court was the appropriate forum because there was a jury trial able to be had there and it was a case of such complexity it should not burden the Bankruptcy Court calendar.

MR. YASSKY: I don't think I have to

answer how you can play dirty pool.

I think the record speaks for itself as to dirty pool being played.

MR. ZIRINSKY: If you want to use the jurisdiction of this court, Mr. Yassky, what is to prevent us from using the jurisdiction of the California Court.

If you take your argument to its logical conclusion, we are going to end up in a morass.

THE JUDGE: When is Mr. Carroll going to be available to come in and tell us first hand --

MR. YASSKY: I am speaking for everything Mr. Carroll said.

MR. ZIRINSKY: Can you speak under oath?

THE JUDGE: You mean to say between now and the end of July Mr. Carroll's calendar is clear, clear as a bell, to take a week for depositions?

Are you able to tell me that?

MR. YASSKY: Yes. If he gives us

three days notice as a courtesy to go out to California, any time in the next several weeks, we can do it, Your Honor. I don't know why you have to pick the end of July because that's why we are here. It's true for the end of July also.

THE JUDGE: Just a minute. You are now telling me that Mr. Carroll can complete the deposition of Mr. Esgro in three days; correct?

MR. YASSKY: I said --

THE JUDGE: Tell me. How long will it take Mr. Carroll to complete the Esgro deposition?

MR. YASSKY: We agreed that we will not spend more than two days and if it is necessary we will adjourn it.

THE JUDGE: What do you mean you will adjourn it? Why can't it be completed in one fell swoop?

MR. YASSKY: How do we know what he is going to answer, what he is going to say, what he is going to come up with.

We will stipulate that we will take two days of his time.

THE JUDGE: What is the broad scope, what is the general area that Mr. Carroll has laid out in preparing for his deposition? Please tell us that.

MR. YASSKY: He intends to go into every allegation in the proof of claim signed by Mr. Esgro as to the question of what he elements of fraud are alleged here, what elements of conspiracy are alleged here, all the questions into liability, and then thereafter go into the question of damages.

THE JUDGE: And he is going to complete this in two days or adjourn it. For how long?

MR. YASSKY: Only at Mr. Esgro's convenience will we adjourn it. We will be glad to go on as long as it takes. At Mr. Esgro's convenience. If he has these pressing matters, we will only take two days at this time.

Then we can go onto take depositions if necessary of whoever else we feel is appropriate.

THE JUDGE: Were there any discussions between Mr. Carroll and counsel in California concerning the convenience of adversary counsel in California? Maybe he has a few appointments?

Do you know whether that was taken into consideration in the discussions between Mr. Carroll and the attorney in California?

MR. YASSKY: No, I don't, Your Honor, but --

THE JUDGE: Maybe there was some subsequent agreement made between Mr. Carroll and counsel out there. I would find that implicit from Mr. Carroll's affidavit.

MR. ZIRINSKY: Your Honor, I would like to submit to you --

MR. YASSKY: I will gladly bring Mr. Carroll in at lunch time. He is over in the State Court.

THE JUDGE: I think we should.

Let the record show that Mr. Zirinsky has handed me a letter dated May 28, 1976, on the letterhead of Gibson, Dunn & Crutcher, addressed to Robert Holtzman, et al.

Mr. Yassky, did you or Mr. Carroll respond to this letter of May 29th?

MR. YASSKY: Mr. Carroll responded to the letter.

THE JUDGE: Do we have a copy of his response?

Mr. Carroll made no mention at all of the suggestion by Mr. Sherwood.

MR. YASSKY: Mr. Carroll's response, Your Honor, is this affidavit that's here in court.

THE JUDGE: Wait a minute. Let's see. Holtzman and Sherwood are the parties who were trying the case out there in California. Mr. Carroll is handling it from New York for the trustees. He gets this letter of May 28th and instead of expressing the outrage that he expresses in this affidavit, he sends this innocuous letter of June 3rd?

MR. YASSKY: With all due respect, Your Honor --

THE JUDGE: Take a look at it. I assume you don't mind -- I am handing Mr. Zirinsky a copy of a letter over the typed name of Daniel I. Carroll, I assume, on the Shea, Gould letterhead, dated June 3.

MR. YASSKY: With all due respect, Your Honor, I discussed this matter with Mr. Carroll. We have no arguments with Mr. Sherwood. We don't want to carry on a correspondence war with Mr. Sherwood as to the problem.

Mr. Carroll's affidavit expresses the matter precisely.

THE JUDGE: If you will revert to the letter from Mr. Sherwood in which he makes the suggestion that he and Mr. Carroll work out a schedule for the deposition of Esgro.

If Mr. Carroll demands -- felt that he wanted Esgro earlier, maybe if he said to Sherwood get Esgro here earlier.

MR. YASSKY: He said that to him. This is a sworn to affidavit, not a personal correspondence that Your Honor asked him for so I sent it up to you. This is a sworn affidavit, Your Honor. A sworn affidavit is a conversation --

MR. ZIRINSKY: Is he here to be cross-examined, Mr. Yassky?

MR. YASSKY: I will get him here. If you don't take my word for it -- you're not going to put Mr. Sherwood here, so what's the purpose of it.

MR. ZIRINSKY: Your Honor, I would also like to request that the court take a look at the second paragraph of this letter which I am appalled at.

It says, regarding point three on page 2 of your letter specifically the notice to admit served in the New York proceeding on April 9, 1976, I wish to reiterate the position I took during our conference calendar last week. Our position is that Esgro, Inc. has failed to timely respond to the notice to admit and therefore all of the matters for which admission re requested are deemed to be admitted under Rule 36 of the Federal

Rules of Civil Procedure.

Your Honor, I submit that this is totally in disregard and total contravention of this court's direction at the conclusion of the trial last week.

That no sanctions would be imposed for tardiness in discovery. It was a clear understanding that due discovery would proceed until there was a summation argument last week and now counsel for the trustees is trying to assert a default in giving of discovery.

MR. YASSKY: This is a short letter. Let me just read the next paragraph if we want to talk about lawyers practices here.

"However, as I mentioned last week, I see no need for us to get into a dispute at this point concerning our position, that I am confident that when you review the notice to admit, you will realize it deals almost exclusively with authentication of documents as to which there would not appear to be any real dispute.

As I mentioned to you last week, I

believe that many of the documents involved were the same as the documents Esgro, Inc. introduced into evidence at the trial held before Judge Ryan on May 21. Sincerely, Daniel L. Carroll."

If you think it is necessary to get Mr. Carroll here to resolve this matter, I respectfully request that you adjourn it. I will find out --

MR. ZIRINSKY: I object, Your Honor.

MR. UASSKY: (Continuing.) -- what courtroom he is in next door and I will get him here as soon as humanly possible but I can certainly speak to this, Your Honor, because I have been in constant communication with Mr.Carroll over the last several days as to the progress that is happening here and as to his conversations with Mr. Sherwood.

Yes, it is hearsay but we don't have the principals.

THE JUDGE: Do the trustees take the position that having failed to respond to that demand to admit under Federal Rule 36,

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the consequences found in the rule apply?

The answer to that, Mr. Yassky, I think is either yes or no.

MR. YASSKY: Yes.

THE JUDGE: Because the following paragraph just says look, it would have been futile for you to have rufused to admit because you would have had no grounds to so do. It is my distinct recollection that I stopped the clock on everything and I think the record will clearly indicate there were to be no sanctions, no consequences at all.

I believe I only mentioned interrogatories in depositions but it was clearly implicit in my statement that the parties start de novo once the forum had been established.

I think at the present time what ought to be done is to consider whether an application ought to be made deeming the discovery commenced on the objection to the Esgro claim to be deemed to be discovery commenced in the action in California and remand the entire

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matter to the California court.

We cannot have this matter tried over a three thousand mile distance, Mr. Yassky.

MR. YASSKY: Your Honor, the trustees happens to be here. This is a reorganization proceeding in this court, Your Honor.

The claim was filed in this court, Your Honor. The White Front books and records are here, Your Honor. Our witnesses are here, Your Honor.

It is a big country, Your Honor. Some people are over in California three thousand miles away and some people are here. This is part of the inconvenience and we will resolve it amicably.

THE JUDGE: If this is amicable, I would hate to see it inamicable.

MR. YASSKY: I don't see them being available the first time the week of July 26th, very amicable. That's why we are here.

THE JUDGE: Fine. Let the parties fight it out in California. This application is denied without prejudice.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants.

FILED
JUN 17 1976
EDWARD J. RYAN
BANKRUPTCY JUDGE

Reorganization Nos.
74 B 614 - 802

ORDER DENYING APPLICATION OF THE REORGANIZATION TRUSTEES

The court having entered an order on May 26, 1976, modifying the stay provisions of the court's order of June 13, 1973 and Chapter X Rule 10-601(a) so as to permit the continua-

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Sworn to before me, this day of 19

A 388

tion of prosecution in the Superior Court of California, County of Los Angeles (the "California Court") of an action and cross-action presently there pending, entitled White Front Stores, Inc., et al., Plaintiffs v. Esgro, Inc., etc., et al., Defendant Esgro, Inc., et al., Cross-Complainants v. White Front Stores, Inc., et al., Cross-Defendants, Case No. C50105 (the "California Lawsuit"), and Joseph R. Crowley and Herbert B. Siegel, as Reorganization Trustees for the above-captioned debtors' estates (the "Trustees"), having applied to this court on June 3, 197 for an order striking the claim (Claim No. 7273A) filed herein by Irving Sulmeyer ("Sulmeyer"), as receiver for the Chapter estate of Esgro, Inc. ("Esgro"), and Sulmeyer and Esgro havi opposed the relief requested by the Trustees, and a hearing having been held before the court on June 4, 1976, and after hearing Shea, Gould, Climenko, Kramer & Casey, attorneys for the Trustees, by Lester Yassky, of counsel, in support of the application, and Weil, Gotshal & Manges, attorneys for Sulme by Bruce R. Zirinsky and Lawrence Mittman in opposition to th application, and upon all of the proceedings had before this court, and sufficient cause appearing therefor, it is

ORDERED that the application of the Trustees be, and the same hereby is, denied (without prejudice) in all respects; and it is further

ORDERED that all (further) pre-trial discovery and inspection relating to the Trustees' objection to Esgro's claim and the California Lawsuit shall be conducted under the auspices and control of the California Court.

Dated: New York, New York
June 16, 1976

Edward J. Ryan
Bankruptcy Judge, as
Special Master

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------x

In re :

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., :

Debtors. :

---------------------------------x

Reorganization Nos.
74 B 614-802
Inclusive

ORDER TO SHOW CAUSE

Upon the annexed affidavit of Martin I. Shelton, sworn to July 9, 1976, upon the Notice dated April 9, 1976 and the application annexed thereto for an order expunging the claim of Esgro, Inc. (No. 7273A) and all proceedings heretofore had in connection with said application, upon the Complaint Under Rule 10-601 For Modification of Stay of Suits filed herein by Irving Sulmeyer, as Receiver for the Chapter XI estate of Esgro, Inc., and all proceedings heretofore had herein in connection with the adversary proceeding commenced by the filing of said Compalint, and sufficient cause appearing therefor, it is

ORDERED that Irving Sulmeyer, Receiver for the Chapter XI Estate of Claimant Esgro, Inc., show cause before the undersigned at the United States Courthouse, Foley Square, New York, New York, Room 236, on the 22nd day of July 1976, at 9:45 a.m. or as soon thereafter as counsel can be heard why an order should not be entered pursuant to Rule 903 of the Rules of Bankruptcy Procedure and Rule X-14(e) of the local Bankruptcy Rules of this Court setting down the trial of the aforementioned application to expunge claim No. 7273A of Esgro, Inc., for September 15, 1976, or as soon thereafter as the Court's calendar permits; and it is further

ORDERED that service of a copy of this order and the application upon which it is based, upon the attorneys listed on the schedule annexed hereto on or before the 13th day of July, 1976, by personal service in the case of attorneys with offices within the City of New York and by mail in the case of attorneys with offices outside of the City of New York shall be deemed good and sufficient service hereof; and it is further

ORDERED that answering papers, if any, shall be filed and served upon Shea Gould Climenko & Casey, attorneys for the Trustees, 330 Madison Avenue, New York, New York on or before the 16th day of July, 1976.

Dated: New York, New York
July, 9th, 1976

/s/ Edward J. Ryan
Bankruptcy Judge

A 391

TO:

JOSEPH BERNFELD, ESQ.
Attorneys for Esgro, Inc.
900 Wilshire Boulevard
Los Angeles, California 90013

GIBSON DUNN & CRUTCHER
Attorneys for Esgro, Inc.
515 South Flower Street
Los Angeles, California 90071

RICHARD C. GREENBERG, ESQ.
DeMARCO BARGER & BERAL
Attorneys for Irving Sulmeyer,
Receiver
515 South Flower Street
Suite 4400
Los Angeles, California 90071

WEIL GOTSHAL & MANGES
Attorneys for Irving Sulmeyer
Receiver
767 Fifth Avenue
New York, New York 10022

SECURITIES AND EXCHANGE COMMISSION
26 Federal Plaza
New York, New York 10007

ZALKIN RODIN & GOODMAN
Attorneys for Institutional Creditors
750 Third Avenue
New York, New York 10017

POPPER & POPPER
Attorneys for Unofficial Creditors
Committee
200 Fifth Avenue
New York, New York 10010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., Debtors.	Reorganization Nos. 74 B 614-802 Inclusive **AFFIDAVIT**

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARTIN I. SHELTON, being duly sworn, deposes and says:

1. I am a member of the firm of Shea Gould Climenko & Casey, attorneys for the Trustees in the above-entitled matter. I make this affidavit in support of the Trustees' motion for an order setting down the Trustees' application for an order expunging claim No. 7273A of Esgro, Inc. for trial on September 15, 1976, or as soon thereafter as the Court's calendar permits. The reason for this application is that it is now apparent that the trial of the action presently pending in the Superior Court of the State of California between the above-captioned debtors and claimant Esgro, Inc. (the "California Proceeding") cannot be had until November 29, 1976 at the very earliest, and it is quite possible that said trial will not commence until a considerably later date. As set forth below, it was undisputed at the hearing heretofore held by this Court on May 21, 1976 that any delay in adjudicating Esgro Claim No. 7273A will substantially prejudice the estate in its attempt to formulate a meaningful plan of reorganization.

2. On April 9, 1976, an application seeking to expunge

Claim No. 7273A of Esgro, Inc. was filed and served. The application was returnable June 13, 1976. Concurrent with the service of that application, various discovery proceedings were instituted by the Trustees, including the service of interrogatories and a notice to admit. At the same time, a notice to take the deposition of Esgro, Inc. by Francis J. Esgro, its President, was served, setting the deposition for May 24, 1976.

3. Toward the end of April, we were informed that Messrs. Weil Gotshal & Manges would be representing Esgro, Inc. in connection with the Trustees' application and a request was made to adjourn the various discovery proceedings. We agreed to this request upon the condition that no further adjournments would be requested.

4. On May 11, 1976, Esgro, Inc. served a summons and complaint under Rule 10-601 for a modification of this Court's stay of suits as contained in its June 13, 1974 order. The complaint sought judgment modifying the stay so as to permit Esgro, Inc. to proceed with the cross-complaint asserted in the California Proceeding dismissing the Trustees' objection to the allowance of Esgro, Inc.'s claim and enjoining the Trustees from commencing or continuing with pretrial discovery before this Court. At the same time, a temporary restraining order which would have stayed pretrial discovery previously commenced by the Trustees was presented to the Court for signature. At a hearing held on May 11, 1976, the Court declined to enter such an order but directed that the trial of Esgro, Inc.'s complaint he had on May 21, 1976.

5. On May 21, 1976, the trial of Esgro, Inc.'s complaint commenced. Esgro, Inc. presented evidence through its California

counsel, Arthur Sherwood of Gibson Dunn & Crutcher, to the effect that a trial of the California Proceeding could be had in the California Superior Court within approximately 8 months, provided the California Court granted a motion for an order advancing the trial date. The Trustees presented evidence which was uncontradicted, demonstrating that it was necessary to obtain an adjudication of Esgro, Inc.'s claim before any feasible plan of reorganization could be formulated and that the pendency of Esgro, Inc.'s Claim No. 7273A was the only real impediment to the formulation of such a plan.

6. On May 26, 1976 this Court signed an order modifying the stay of suits contained in the June 13, 1974 order so as to permit the parties to make an appropriate application to the Superior Court of the State of California seeking an order advancing the trial date of the California Proceeding. That order also directed that all discovery and other pretrial proceedings in both the proceedings instituted herein by the Trustees on their application to expunge Claim No. 7273A, to the extent theretofore noticed or served, and in the California Proceeding be conducted and completed on an expedited basis.

7. Following the entry of the May 26, 1976 order an attempt was made to depose Mr. Esgro at the earliest possible date. However, Esgro's California counsel took the position that Mr. Esgro would not be available for deposition until the end of July. This precipitated a motion by the Trustees to strike Esgro's claim upon the ground that it had failed and refused to appear for the deposition previously noted. This motion was denied, without prejudice, by order dated June 16, 1976.

8. Meanwhile, in accordance with this Court's May 26, 1976 order, California counsel for the Trustees applied to the California Superior Court for an order advancing the trial date of the California Proceeding. This motion was returnable on June 28, 1976 and on the return date of the motion a trial date of November 29, 1976 was set. However, for the reasons discussed below, I respectfully submit that this apparent trial date for the California Proceeding does not warrant this Court's further delaying the debtor's attempt to formulate a plan by permitting the issues presented by Esgro Claim 7273A to be tried in California but, rather, dictates that this Court should set this case down for an immediate trial on September 15, 1976 or as soon thereafter as the Court's calendar permits.

9. First, I am informed by California counsel, Robert Holtzman of the firm of Loeb & Loeb, that November 29, 1976 in no way represents a firm trial date. In addition to the normal delays that may be encountered should a trial part not be available in the California Superior Court on November 29, 1976, Mr. Holtzman informs me that, based upon prior experience, the trial in this action may well be delayed for an additional 3 or 4 months. The reason for this was explained by Mr. Holtzman when he testified at the hearing held on May 21, 1976. Thus, Mr. Holtzman testified as follows:

[illegible]

> "Q. How long in the normal course would be involved between the filing of a certificate of readiness and the trial, the time it comes up for trial to the first time on the trial calendar?

Trial set 40:1

"A. As I said from the Certificate of Readiness -- from the filing of the certificate of readiness to a trial-setting conference --

THE COURT: You said 45 to 60 days.

THE WITNESS: You are running about 45 to 60 days. From the trial setting conference to the trial date, ideally, it is supposed to be not more than 60 days. In recent experience, it's been about 90 days.

This could hypothetically.

"Q. Is there any variation from that normal procedure at the present time, that you are aware of?

"A. Yes, there is.

"Q. Would you explain what variations there are?

"A. In recent time -- and by this, I mean as recently as the month of April, 1976 -- the master calendar department has been unable to accommodate cases set for trial when they come on for trial and as a consequence, cases have been continued by the Court on its own motion as they reported for trial in rather wholesale fashion.

What in effect has happened is that the presiding judge has been required to order all cases coming on for trial for the first time -- again I'm talking about civil cases -- before the master calendar department to be continued. For example, in April they were continued to around July, simply due to the unavailability of trial departments."

10. According to Mr. Holtzman, delays similar to the 3 to 4 month delays referred to above as having occurred last April also occurred last Fall. Therefore, despite the November 29, 1976 "trial date" should the California Court's master calendar department be unable to accommodate cases set for trial when they come on for trial at the end of November, all cases, including the California Proceedings could again be subject to an automatic adjournment of 3 to 4 months.

11. In addition, there is no reason why the trial of the Trustee's application to expunge Esgro, Inc. Claim 7273A cannot be had before September 15, 1976. The bulk of the Trustee's discovery will be completed after the depositions scheduled to be held between July 21 and July 28 are held. We have been told by Esgro's California counsel that he intends to come to New York for a series of depositions sometime in August and possibly another series of depositions in September. To date, documents have been produced by both sides and interrogatory answers are scheduled to be served today. In addition, most of the remaining pretrial discovery which will be required by the Trustees will be directed to the issues involved in the complaint in the California Proceedings. Such discovery could be curtailed considerably if the Trustees did not at this time have to prepare for a trial of the complaint in the California Proceeding.

12. Also, based upon my review of this matter, I firmly believe that the trial of the Trustee's application to expunge Claim No. 7273A will take no more than two weeks. One of the reasons for this is that if the trial is held in New York, the testimony of the Trustee's principal witness, Harry Epstein

will be introduced in the form of deposition testimony rather than live testimony. Mr. Epstein is a resident of California and, therefore, is beyond the subpoena power of this Court. However, Mr. Epstein's deposition is scheduled to take place on July 28, 1976. This is also true of at least one other witness the Trustees presently intend to call.

13. For all of the foregoing reasons, it is respectfully requested that the within motion be granted and that the trial of the Trustee's application be set down for September 15, 1976 or as soon thereafter as the Court's calendar permits.

MARTIN I. SHELTON

Sworn to before me this
1st day of July, 1976.

Notary Public

DANIEL E. CARROLL
Notary Public, State of New York
No. 41-4500370
Qualified in Queens County
Commission Expires March 30, 1978

OFFICE COPY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re :

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al, : Reorganization Nos. 74 B 614-802 Inclusive

Debtors.
-----------------------------------x

FILED
JUL 20 1976
EDWARD J. RYAN
BANKRUPTCY JUDGE

AFFIDAVIT IN OPPOSITION TO TRUSTEES' APPLICATION FOR ORDER DIRECTING TRIAL OF OBJECTION TO CLAIM OF ESGRO, INC.

STATE OF NEW YORK)
). ss.:
COUNTY OF NEW YORK)

BRUCE R. ZIRINSKY, being duly sworn, deposes and states, as follows:

1. I am an attorney at law admitted to practice before this court and am associated with the firm of Weil, Gotshal & Manges, attorneys for Irving Sulmeyer ("Sulmeyer"), as Receiver for the Chapter XI estate of Esgro, Inc. ("Esgro"). I make this affidavit in opposition to the application of Joseph R. Crowley and Herbert B. Siegel, as Reorganization Trustees for the above-captioned debtors' estates (the "Trustees"), for an order fixing a trial date before this court on the Trustees' objection to the claim of Esgro (Claim No. 7273 A).

2. I have personal knowledge of all of the matters set forth in this affidavit, except as to those matters expressly stated by me to be known upon information and belief.

3. On or about April 9, 1976, the Trustees filed an application with this court seeking an order expunging the claim of Esgro, duly filed with this court in the amount of $38,758,972.00. The hearing on the Trustees' objection to

the claim was scheduled for June 13, 1976.

4. On May 11, 1976 Sulmeyer commenced an adversary proceeding before this court pursuant to Chapter X Rule 10-601, for a modification of this court's stay of suits against the debtors, so as to permit the continuation of prosecution in the Superior Court of California, County of Los Angeles (the "California Court") of an action and cross-action presently there pending, entitled, "White Front Stores, Inc., et al., Plaintiffs v. Esgro, Inc., etc., et al., Defendants; Esgro, Inc., et al., Cross-Complainants v. White Front Stores, Inc., et al., Cross-Defendants, Case No. C50105 (the "California Lawsuit").

5. A trial of the adversary proceeding was held before the court on May 21 and May 26, 1976, and was concluded on May 26, 1976.

6. On May 26, 1976, this court entered an order modifying its stay of suits so as to permit the continued prosecution of the California Lawsuit. A copy of said order is annexed hereto as Exhibit "A."

7. The aforesaid order provided, inter alia, that the parties to the adversary proceeding were to make an appropriate application at the earliest possible time to the California Court for an order advancing the trial date so as to obtain the earliest possible trial of the California Lawsuit.

8. Thereafter, and on or about June 3, 1976, the Trustees applied to this court for an order expunging the claim of Esgro upon the purported ground that Esgro had failed and refused to appear for a deposition upon oral examination which had been noticed by the Trustees by notice dated April 9, 1976. After a hearing held before this court on June 4, 1976, the court entered an order dated June 16, 1976, a copy of which is

annexed hereto as Exhibit "B," denying the Trustees' application in all respects and directing that all further pre-trial discovery and inspection relating to the Trustees' objection and the California Lawsuit be conducted under the auspices and control of the California Court.

9. The instant application of the Trustees seeks, in effect, to nullify this court's order of May 26, 1976, which modified the stay so as to permit the continued prosecution of the California Lawsuit. In this context, it should be noted that the time in which to take an appeal from said order has expired and the parties are bound by the court's decision. Nonetheless, it cannot be disputed that this court did retain jurisdiction for the purposes of reinstating the stay should the parties be unsuccessful in obtaining an advance of the trial of the California Lawsuit in the California Court. However, this is not the relief requested by the Trustees.

10. It is undisputed that the California Court, upon application of the parties, has fixed November 29, 1976, as the date of commencement of a jury trial of the California Lawsuit.

11. At the trial of the adversary proceeding to modify the stay, held on May 21, 1976, Mr. Robert Holtzman, California counsel for the Trustees, testified that it was his best estimate that if a motion for a trial preference were granted by the California Court, a trial date would be set approximately eight months thereafter. As testified by Mr. Holtzman at the trial:

> "Bearing in mind that we are talking about something addressed to the very broad discretion of the presiding judge, I would say that the greatest probability is that the case could be brought on for trial in about eight months. I doubt very much in the present condition of the Court's calendar that this case could be brought on any more quickly than that; although I must concede that it is possible." [Transcript, 5/21/76, p. 178]

12. Thus, when this court modified the stay, it expressly countenanced that it would probably take at least eight months for the trial to commence in the California Court. In fact, however, a trial date has now been obtained within six months of that time, at least two months sooner than had been anticipated at the trial of the adversary proceeding. As a result, the prospects for an early judicial determination of the disputes between the parties have been greatly enhanced.

13. Based upon the foregoing, there is absolutely no basis for the court to grant the instant application of the Trustees. As stated by the Court at the conclusion of the trial of the adversary proceeding on May 26, 1976:

> "When this order is signed, it is going to go forward in California, subject to being stayed, re-stayed on a showing, either that the attorneys in California for the Plaintiff are being delatory [sic], or that it is not feasible to get an early trial in California." [Transcript, 5/26/76, p. 56]

14. Further, the Trustees' application requests that this court set a trial date on September 15, 1976, or as soon thereafter as this court's calendar will permit. It is stated in the affidavit of Mr. Arthur Sherwood, California counsel for Esgro, being submitted to the court simultaneously herewith, that at the hearing conducted before the California Court on the application for a trial preference, the California Court indicated to counsel for the parties that on the basis of the application and the supporting memorandum, the California Lawsuit could be set for trial in October or November 1976 or possibly late September 1976. Mr. Holtzman, representing the debtors, told the California Court that the setting of the matter for trial either for late September or for late October or early November would be inconvenient since he was scheduled to be

engaged in other trials at or about those times and he requested that the matter be set in late November. Thus, had the Trustees' own counsel been available for trial, a trial date in advance of November 29, 1976 could have been fixed by the California Court. In this context, the instant application of the Trustees is a sham and constitutes an imposition upon this court.

15. Furthermore, the affidavit of Martin Shelton submitted in support of the Trustees' instant application is premised upon sheer speculation with at best, a superficial knowledge of the California Lawsuit. At the trial on May 21, 1976, Mr. Sherwood testified that it would take a minimum of five weeks to try the California Lawsuit. [Transcript, 5/21/76, p. 164] Mr. Holtzman estimated that it would take between six and eight weeks to try the California Lawsuit. [Transcript, 5/21/76, p. 185] Notwithstanding the expert opinion of the two attorneys most familiar with the case, Mr. Shelton cavalierly states that the trial on the Trustees' objection to the claim of Esgro could be completed in two weeks. Moreover, Mr. Shelton's estimate is based upon an apparent determination on the part of the Trustees to try the case on the deposition of Mr. Harry Epstein, upon information and belief the Trustees' key witness. Clearly, it would be preferable to try the case on live testimony, as extensively argued by me before this court at the trial of the adversary proceeding.

16. The Trustees' instant application is just another in a series of frivolous motions for the purpose of relitigating issues already determined by this court.

17. For all of the foregoing reasons, the Trustees' application should be denied in all respects and Sulmeyer should be granted his costs and attorneys' fees in connection with

the defense thereof.

BRUCE R. ZIRINSKY

Sworn to before me this
15th day of July, 1976.

Notary Public

MICHAEL L. COOK
Notary Public, State of New York
No. 31-0746535
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------x

In re :

INTERSTATE STORES, INC., et al., :

Debtors, :

IRVING SULMEYER, as Receiver for
the Estate of ESGROL INC., a
Debtor in Chapter XI, :

Plaintiff, :

-v- :

JOSEPH R. CROWLEY, et al., :

Defendants. :

-----------------------------------x

Reorganization Nos.
74 B 614-802

ORDER

Plaintiff having instituted an adversary proceeding pursuant to Rule 10-601 by filing a complaint seeking, inter alia, modification of this Court's stay of suits as contained in its June 13, 1974 order as amended by an Order dated October 20, 1975 so as to permit the prosecution by plaintiff of a certain cross complaint presently pending in an action commenced against Esgro, Inc., and others by White Front Stores, Inc. and others in the Superior Court of the State of California, County of Los Angeles (No. C50105) (the "California Proceedings");

AND, issue having been joined, this Court having held a trial on May 21, 1976 and having considered all of the evidence presented by the respective parties at said trial and having also heard the Securities and Exchange Commission and Zalkin Rodin & Goodman, attorneys for the debtors' institutional lenders, in opposition to the relief demanded in the complaint; it is hereby

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ORDERED, that the stay of suits contained in this Court's June 13, 1974 order, as amended, be and the same hereby is modified ~~but only to the extent indicated herein~~; and it is further

ORDERED, that all parties to the instant proceeding be, and they hereby are, directed at the earliest possible time to make an appropriate application to the Superior Court of the State of California, County of Los Angeles seeking an order advancing the trial date so as to obtain the earliest possible trial of the California Proceedings; and it is further

ORDERED, that all discovery and other pre-trial proceedings in both the proceeding instituted herein by the Trustees on their application to expunge Claim 7273A of Esgro, Inc., (the "Trustees' Proceeding"), to the extent ~~[illegible]~~ heretofore noticed, or [illegible] and in the California Proceedings be conducted and completed on an expedited basis; and it is further

ORDERED, that all discovery and all pretrial proceedings, including but not limited to requests for admissions, either heretofore or hereafter commenced in either the Trustees' Proceeding or in the California Proceedings, may be used in both of said proceedings, both parties having heretofore agreed to this provision of this order; and it is further

ORDERED, that the parties report to the Court on or before July 8, 1976 for the purpose of advising the Court as to the progress of discovery proceedings and the result of their application to the California Superior Court for an order advancing the trial date of the California Proceedings; and it is further

ORDERED, that, except to the extent otherwise indicated herein, the relief requested in the complaint herein be and the same hereby is denied in all respects.

Dated: New York, New York
May 26, 1976.

/s/ Edward J. Ryan
Bankruptcy Judge

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------------x

In re

INTERSTATE STORES, INC., *et al.*,

Debtors,

FILED
JUN 17 1976
EDWARD J. RYAN
BANKRUPTCY JUDGE

25

IRVING SULMEYER, as Receiver for the Estate of ESCRO, INC., a Debtor in Chapter XI,

Plaintiff,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants.

------------------------------------x

Reorganization Nos.

74 B 614 - 802

ORDER DENYING APPLICATION OF THE REORGANIZATION TRUSTEES

The court having entered an order on May 26, 1976, modifying the stay provisions of the court's order of June 13, 1973 and Chapter X Rule 10-601(a) so as to permit the continua-

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FILED

JUL 20 1976

EDWARD J. RYAN
BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-- x

In re

INTERSTATE STORES, INC., formerly
known as INTERSTATE DEPARTMENT
STORES, INC., et al.,

Debtors.

-- x

Reorganization Nos.
74 B 814-802
Inclusive

AFFIDAVIT OF ARTHUR L.
SHERWOOD

I, ARTHUR L. SHERWOOD, being duly sworn, depose and state as follows:

1. I am an attorney at law duly admitted to practice before all courts in the State of California and a partner in the law firm of Gibson, Dunn & Crutcher, with my office located in Los Angeles, California. I am submitting this Affidavit in connection with proceedings on an "Order to Show Cause" dated July 9, 1976 in the above proceedings.

2. In connection with the proceedings in the above-entitled Court in this matter and, specifically, in connection with the Order of this Court resulting from the trial of Esgro, Inc.'s Complaint for modification of this Court's stay of suits with respect to the dispute between the debtors and Esgro, Inc., an appropriate application was made to the Superior Court of the State of California seeking the setting of an early trial date in connection with the California State Court proceedings in this dispute. In connection with that Application, I had suggested to California counsel for debtors

A 410

that such Application could be a joint one made on behalf of both the debtors and Esgro, Inc. California counsel, Mr. Robert L. Holtzman of the law firm of Loeb and Loeb, declined such offer and indicated he preferred to make such Application on behalf of the debtors alone. I agreed and did, in fact, file on behalf of Esgro, Inc. [and the other parties I represented] a written Memorandum supporting the Application for an early trial setting and urging the Los Angeles Superior Court to set a trial date in this matter at the earliest possible date. The hearing on the Application for an early trial date in the Los Angeles Superior Court was held before the Master Calendar Department of that Court on June 28, 1976. Mr. Robert Holtzman, representing the debtors, appeared as did I and we both urged the Court to set trial at the earliest practicable date. During the proceedings on this Application and the actual setting of a trial date, the Court indicated to counsel that on the basis of the Application and the supporting Memorandum, this case could be set for trial in October or November 1976 or possibly late September 1976. Mr. Holtzman, representing the debtors herein, told the Court that the setting of this matter for trial either for late September or for late October or early November would be inconvenient since he was scheduled to be engaged in other trials at or about those times and he requested that the matter be set in late November. There were no possible trial dates available to the Court in early October and I indicated to the Court that I had scheduled a trial in another matter to commence on November 1, 1976 and, as a consequence, I also asked that the matter be set for trial in late November. As a result of these requests of counsel and with the full concurrence and agreement of both Mr. Holtzman and myself, the trial date in this matter was set by the Los Angeles Superior Court in "White Front Stores, Inc. et al. v. Esgro, Inc., et al." for November 29, 1976.

3. As is evident the date set for trial in this California action is well within the 8 month estimate given to this Court by both counsel for debtors and myself.

4. During the course of the discussions between counsel for debtors and myself leading up to the filing of the Application for an early trial date in the Los Angeles Superior Court action, I suggested both to Mr. Robert Holtzman, debtors' California counsel and to Mr. Daniel Carroll, debtors' New York counsel, that it would be useful to expedite discovery and in order to assure the earliest possible trial date for us to agree to and request that this matter be assigned to one Superior Court judge for all purposes. If this were done, for instance, there would likely be a better assurance that this case would be tried on the date set for trial since we would have a commitment of a particular trial judge for that purpose. Counsel for debtors did not pursue this suggestion.

5. Mr. Martin I. Shelton, in his Affidavit in connection with this Order to Show Cause proceeding discusses

certain of Mr. Holtzman's testimony concerning local California Court procedures and the certainty of a trial on a particular date. While much of the discussion in Mr. Shelton's Affidavit is not pertinent (since it concerns the procedure for obtaining a trial date, and a trial date has already been set in this action), I would point out that the Los Angeles Superior Court Master Calendar Department is now sending cases out for trial at or about the date set and has given no indication that it will not continue to do so for the rest of this year. Any conclusion that the trial in this matter will not commence on or soon after November 29, 1976 in the Los Angeles Superior Court is pure speculation.

6. Counsel for Esgro, Inc. will be prepared to commence trial on this matter in the Los Angeles Superior Court on November 29, 1976 and, in view of the substantial amount of discovery to be completed, I would not anticipate that all of the necessary discovery could be completed much in advance, if at all, of late October 1976.

/s/ Arthur L. Sherwood

Subscribed and Sworn to
Before me this 14th day
of July 1976

/s/ Nancy A. Shapman
[Official Seal]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

INTERSTATE STORES, INC., formerly
known as INTERSTATE DEPARTMENT
STORES, INC., et al.,

Debtors.

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Reorganization Nos.
74 B 614-802 Inclusive

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

MARTIN I. SHELTON, being duly sworn deposes and says:

1. I am a member of the firm of Shea Gould Climenko & Casey, attorneys for the Trustees herein and respectfully submit this reply affidavit in connection with the application of the Trustees to set the trial of the Esgro claim herein before it on September 15, 1976.

2. I have read the affidavit of Bruce R. Zirinsky in which our motion is characterized as "frivolous". I submit that the record and the orders of this Court speak for themselves and there is really no basis in fact for counsel's assertion that this Court has already determined the matter. Suffice it to say that the Court in its order of May 26, 1976 directed that the parties report to the Court on or before July 8th for the purpose of advising it "as to the progress of discovery proceedings and the result of their application to the California Superior Court for an order advancing the trial date of the California Proceedings." If this court had decided to modify the stay for all purposes there would have been no need that a report be made to the court as to the status of this matter. The transcript of the hearings heretofore had herein which are expressly incorporated herein by reference are replete with references to the fact that the court did not intend such a disposition, but on the contrary that it be

kept advised of the California Proceedings so that it would make whatever orders were appropriate.

3. The affidavits of Messrs. Sherwood and Holtzman appear to conflict to some extent as to the earliest possible date upon which a trial could have been obtained in California. In view of Mr. Sherwood's admission in his own affidavit that he "would not anticipate that all of the necessary discovery could be completed much in advance, if at all, of late October, 1976" and that he had a trial of another matter scheduled "to commence on November 1, 1976" and in view of Mr. Holtzman's clear statement in his affidavit that his trial calendar could certainly accommodate a trial in the latter part of September (which, incidentally, he says was never offered) the fixing of a trial date in late November was certainly not attributable to Mr. Holtzman's other engagements as Mr. Sherwood would have this court believe.

4. The plain fact is that unless and until Mr. Esgro's claim, which has been filed herein is adjudicated the Trustees will not be able to formulate a plan of reorganization and a trial in late November of 1976 - which is by no means certain under California practice - is certainly not in the best interests of this estate. Until the Esgro claim is adjudicated, there can be no plan because the question of solvency can not be determined until the claim is determined. No contingent plan can be formulated until that is done. To defer to a California court under such circumstances would, in my opinion, be entirely inappropriate especially since interest could run on all claims if the estate is solvent.

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5. As this Court is aware, the objections on this claim were first noticed for hearing on June 13, 1976. This was done in April and other pre-trial discovery proceedings were served at that time. As a consequence of the delays which have ensued herein and which are attributable solely to Mr. Esgro's inability to have his deposition taken prior to tomorrow, oral depositions have not yet commenced.

6. While the Trustees are perfectly willing to try their own claim against Esgro in this Court to prevent two trials, they are also quite content to try Mr. Esgro's claim alone here because that will take up less trial time of this Court and the prompt disposition of Esgro's claim is of the utmost importance to the Estate.

7. Accompanying this affidavit are two affidavits of Robert Holtzman. One is attached in the form of a copy which Mr. Holtzman advises me he signed and sent to us, but which has not yet been received by us and the second is sworn to on July 16, 1976 and is annexed hereto.

MARTIN I. SHELTON

Sworn to before me this
20th day of July, 1976

Alice Manos

ALICE MANOS
Notary Public, State of New York
No. 24-7702340
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re :

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., :

Debtors. :

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Reorganization
Nos. 74 B 614-802
Inclusive

AFFIDAVIT OF ROBERT A. HOLTZMAN

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

ROBERT A. HOLTZMAN, being first duly sworn deposes and says:

1. I am an attorney at law and a member of the firm of Loeb and Loeb. I am the attorney principally responsible for the prosecution of the civil action by White Front Stores, Inc. and its affiliated operating corporations against Esgro, Inc. and others pending in the Superior Court of the State of California for the County of Los Angeles, being case No. C 50105 in the records and files of said court ("the California action"). I am fully familiar with the California action, and if called as a witness could testify competently to each and all of the matters set forth hereinbelow.

2. On Monday, June 28, 1976, I appeared in Department 1 of said Superior Court on my noticed motion to restore the California action to the calendar of the court and for an early trial date. Arthur L. Sherwood, Esq., of Gibson, Dunn & Crutcher, counsel for the defendants, filed papers supporting my motion and also appeared before the court. There

was no argument; the presiding judge granted the motion forthwith and ordered us to confer with the Civil Calendar Setting Clerk on a trial date and mandatory settlement conference date consistent with our calendars and the calendar of the court.

3. Mr. Sherwood and I thereupon proceeded to Room 234 of the County Courthouse, where we met with its Setting Clerk. She reviewed the court's computer printout on available and conflicting dates, and inquired of us concerning our availability. She told us that we could set the trial to commence in late October -- I believe she mentioned the date of October 25, 1976 specifically -- or during the month of November. Mr. Sherwood stated that he had a trial in San Francisco commencing on November 1, 1976, and required time to prepare for it. He said he could not accept any trial date in late October or during the first two weeks of November, for this reason. He had previously described this San Francisco trial to me as involving a class action, to be tried to a jury, which presented significant difficulties and required major preparation. I stated that I had an important trial in the United States District Court in San Diego, set to begin November 2, 1976, and that although I expected the case to settle I had to proceed on the assumption that it would go ahead; accordingly, I concurred in Mr. Sherwood's statement that we could not set the case on the available date in late October, or during the first two weeks in November.

4. The Setting Clerk then offered us November 15, November 22 and November 29, 1976 as trial dates. Noting that

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starting dates of November 15 and November 22 would provide limited preparation time following the preceding trials, and that the week of November 22 would be only a partial week due to the Thanksgiving Holiday, we selected the November 29 date as the earliest compatible with our trial calendars, the calendar of the court, and the need for adequate last minute preparation. The clerk thereupon set the matter down for trial commencing at 9:00 o'clock a.m. November 29, 1976, in the Master Calendar Department of the Superior Court.

5. The California action was also set down for a mandatory pretrial settlement conference on October 29, 1976.

6. Except for the contingency described below I expect to report to the Master Calendar Department at 9:00 o'clock a.m. on November 29, 1976 prepared to commence the trial of the case. Based upon the ordinary condition of the court calendar at that time of year, I anticipate assignment to a trial judge within two to four days after November 29, and commencement of trial at that time or the following day.

7. From time to time over the last several years the condition of the calendar of the Los Angeles Superior Court has become so congested during the winter months that all cases set for trial during a given period or on a given date have been continued over a period of approximately four months. As I pointed out to the court in oral testimony, such a condition existed during the past winter, and on numerous occasions all civil actions set for trial were so continued. It is possible that this condition may occur again in the latter part of 1976,

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as the number of judges available has not been increased despite repeated and highly publicized requests by the presiding judge for further judicial assistance. Subject to the uncertainty created by the possibility of court congestion I expect the trial of the California action to commence as above indicated.

Robert A. Holtzman

Subscribed and Sworn
to before me this_______day of
July, 1976

Notary Public in and for
Said County and State

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	Reorganization Nos. 74B 614 - 802
INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,	SUPPLEMENTAL AFFIDAVIT OF ROBERT A. HOLTZMAN
Debtors.	

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Robert A. Holtzman deposes and says:

1. Having been advised of certain matters set forth in the Affidavit of Arthur L. Sherwood filed herein, I supplement my previous affidavit as hereinafter set forth.

2. My recollection of the hearing on June 28, 1976 is as set forth in my previous affidavit; as I have stated the hearing was exceedingly brief and consisted, in essence, of the judge's statement, after he had perused the papers, that the motion was granted and that counsel should proceed to Room 234 to get a trial date. I recall no discussion before the judge of trial dates in September or in October or in November or at any other time.

3. I recall no offer of a September trial date by the trial setting clerk; had a trial date been available in the latter part of September my calendar could have accomodated it.

4. I did have considerable private conversations with Mr. Sherwood concerning available and conflicting trial dates, in respect to both his calendar and my calendar, and I feel that his recollection of discussions concerning September dates is based upon such private conversations. In the course of such conversations I did indeed tell him that I had a case set for trial on September 1, 1976 and another set for trial on September 7, 1976; I further stated that both trials were expected to be of fairly short duration and that, given a few days for last minute preparation after the September 7 trial were completed,

I would be ready to proceed with the trial of the Esgro matter.

Robert A. Holtzman

Subscribed and sworn to before me
this 1st day of July, 1976.

Patricia B. Cronk
Notary Public in and for the State of
California

OFFICIAL SEAL
PATRICIA B. CRONK
My Commission Expires January 8, 1979

PATRICIA B. CRONK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

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In Re:

INTERSTATE STORES, INC., et al.,

Debtors

-against-

IRVING SULMEYER, As Receiver
for the Estate of ESGRO, INC.,
Debtor in Chapter XI,

-against-

JOSEPH R. CROWLEY and
HERBERT B. SIEGEL, et al,

Defendants.

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74 B 614-802

United States Courthouse
Foley Square, New York, N. Y.
July 20, 1976
2:30 p.m.

Before:

HONORABLE EDWARD J. RYAN, Bankruptcy Judge

ORDER TO SHOW CAUSE TO SET TRIAL DATE ON APPLICATION TO EXPUNGE CLAIM NUMBER 7273A of ESGRO, INC.

GERALD I. METZ, C.S.R.
OFFICIAL COURT REPORTER

APPEARANCES (continued):

MESSRS. SHEA, GOULD, CLIMENKO, KRAMER & CASEY
Attorneys for Trustees
BY: MARTIN SHELTON, ESQ.
330 Madison Ave.
New York, N. Y.

MESSRS. WEIL, GOTSHAL & MANGES
Attorneys for Esgro, Inc.
BY: BRUCE ZIRINSKY, ESQ.,
Of Counsel
767 Fifth Avenue
New York, N. Y.

and

MARSHA GOLDSTEIN, ESQ.

JEROME FELLER, ESQ.
Attorney for Securities and Exchange Commission
26 Federal Plaza
New York, New York

and

MERYL WIENER, Of Counsel

****

THE COURT: Are you ready to go forward, Mr. Shelton?

MR. SHELTON: Yes.

May it please the Court, may I hand up some reply affidavits in connection with this matter.

THE COURT: Surely.

MR. SHELTON: May it please the Court, this is an application to set the trial of the Esgro case here in this court on September 15, 1976, insofar as a proof of claim is concerned, or as soon thereafter as this Court can fix conveniently a trial date.

Now, your Honor, there have been two orders entered in these proceedings. Your Honor, I am sure, is fully aware of them. One was on an application of counsel for Esgro to modify the stay, in which your Honor entered an order and which was signed on May 26, 1976, which, in effect, modified the stay to a certain extent. The last decretal paragraph of your Honor's order denied the motion in all other respects.

After that, your Honor, we made a motion to strike the claim of Esgro for failure to appear for a deposition. Your Honor denied that without prejudice and directed that all future discovery proceedings proceed in California.

Pursuant to your Honor's direction, as contained in the order of this Court entered on May 26, 1976, the parties proceeded to California in an effort to get an early trial date. They got November 29, 1976, which in my opinion, and in the opinion of the trustees, is not good enough for us. We need a much earlier trial date because we are under an obligation, your Honor, to come forward with a plan of reorganization, and the testimony that was adduced here before your Honor makes it cogently clear that absent a determination of the Esgro claim, which is approximately $38.5 million, you can't make a determination as to the solvency of the estate, and absent solvency, you can't possibly formulate a plan of reorganization that has any meaningful meaning.

Your Honor, I don't intend to rehash these whole entire proceedings. I think your Honor has had a day of trial here.

I think he's fully acquainted with all of the facts, and I'm particularly mindful of the Court's problems with respect to scheduling a trial before it because I think I, better or certainly as much as any other lawyer in this courthouse, knows what a tremendous calendar your Honor has and how difficult it will be to schedule a trial here. But I suggest to your Honor that it just must be done and perhaps if your Honor doesn't have the ability to do it within the time limitations that we think are feasible, I earnestly urge your Honor to permit us to go to Judge Cannella or any of the other thirty District Judges in this District to set a trial date.

In opposition to this motion, Mr. Zirinsky has taken the position that your Honor has decided this motion and that my application is frivolous. I respectfully dissent. I don't make frivolous applications to the Court. I have never been in the habit of doing so and I don't sign affidavits unless I believe they are absolutely truthful and unless I believe they are meritorious. I suggest to your Honor that your Honor never lifted the stay to permit a trial of the action in California. I have searched carefully through the orders. Your Honor never did that. Your Honor directed that certain things be done. That was done. Now we have come back here and said to your Honor, November 29th is what they gave us in California.

Now Mr. Zirinsky has said in his affidavit that we could have gotten an earlier date. I don't think that's correct. I have talked to my counsel out there, and if there is any delay at all, it's not due to my counsel; it's dueto counsel for Esgro in California. I think the affidavits have established that, although I do submit to your Honor and concede that there is an apparent conflict in the affidavits submitted by both California counsel.

But, your Honor, this case is so important to us because it contains such a huge amount in terms of dollars and cents, over $40 million in claims, and your Honor is aware of the fact and must be, that the determination of solvency will depend upon whether or not that claim is expunged or perhaps allowed to a certain extent, and absent that, you just can't go ahead with a plan of reorganization.

Judge, I know that stays have been lifted in certain circumstances. In my judgment, though, in view of the delay to the estate, the crucial importance of this particular claim, the need of the reorganization court to retain jurisdiction, really over this whole proceeding, especially in this case with such a huge claim, that the Court should not modify the stay to permit the suit to go forward in California.

Your Honor knows that we served our notice of objections to this Claim in April of this year, and we noticed a trial for June . If discovery would have proceeded in accordance with our

The next page is A450.

schedule, we would have been ready to try this case in June, your Honor. As a consequence of the delays of Esgro, we haven't even commenced the oral examination. They are commencing tomorrow. Mr. Carroll of my office is out there, and he's ready to go as long as need be. We must conclude this claim. It is essential to a good reorganization, to any possible plan of reorganization to permit it to go forward nad to go forward promptly, and we think that must be done here in this Court. November 28th is much too late. You are liable to have a trial out there, according to them, for four, five months. Then you may have appeals.

Your Honor, why is this claim different from any other claim? It just seems to me there are no equities that have been shown on Esgro's part which justify this Court in suddenly relinquishing its jurisdiction to permit the claim to be tried out in California when we have such a wait out there.

Mr. Holtzman in his affidavit says there is no absolute assurance that you are going to go to trial on November 28th. I don't know the answer to that. I do want to say to your Honor that I talked with Mr. Carroll this morning, who said that he had just seen the answers to the interrogatories that have been filed by Esgro, and he says to me they did everything but give us the information we needed, such as what the damage claim is based on, and things like that. They didn't specify documents. As a consequence of that, and in view of your Honor's order as it now stands, we are going to have to move in California for some relief out there. I don't know the reason why we should be compelled to litigate this matter in California when it could be done here much quicker, much simpler and to meet the needs of a very complicated and difficult reorganization, otherwise the creditors and shareholders of the debtor will suffer substantially.

I submit, your Honor, that we ought to try this case here as soon as your Honor's calendar permits, and absent that, we ought to be permitted to go to Judge Cannella and ask him if he could set a trial date.

Thank you, your Honor.

THE COURT: Mr. Zirinsky?

MR.ZIRINSKY: Your Honor, many of the comments of my adversary are directed to matters that were fully considered by thisCourt at the trial of the adversary proceeding for a modification of the stay.

THE COURT: Incidentally, are your papers in opposition on file? I don't have anything before me, except for the trustees' moving papers, and the reply affidavit.

MR. ZIRINSKY: Yes, your Honor. We filed yesterday two affidavits, my affidavit as well as the affidavit of Mr. Sherwood. I do have copies here for your Honor. As a matter of fact, Mr. Sherwood's affidavit as filed was a telecopy. I do have with me the original and I will be happy to present your Honor with a copy. (Handing)

THE COURT: Thank you.

MR. ZIRINSKY: Your Honor, the first point I would like to address myself to is to Mr.Shelton's statement that your order of May 26, 1976, was a limited modification of the stay. Your Honor, we have been through this matter twice already. The first time came on the settlement of the original order modifying the stay, at which time your Honor made it perfectly clear and it's on the record, it's in the transcript, that upon the signing of the order, the stay will be modified so as to permit the California litigation to proceed, subject to being reinstated, should the parties be unable to obtain an advancement of the trial, or should the parties fail to cooperate in the giving of expeditious discovery.

Thereafter, your Honor, the trustees brought on an application before your Honor seeking to expunge Esgro's claim on the purported ground that Esgro had failed to give discovery.

With all due deference to Mr. Shelton, your Honor that application was denied in all respects. As a matter of fact, your Honor, at that hearing it became apparent that the trustees were relying upon a default in the giving of discovery, and a letter of Mr. Carroll addressed to Mr. Sherwood, California counsel for Esgro, so indicated that on a request for admissions, that because Esgro had not responded, those matters were deemed to have been admitted.

Your Honor, that was in direct contravention of your direction at the trial that all discovery proceedings would remain in status quo until it had been determined by your Honor whether or not to modify the stay.

Your Honor, constantly in this proceeding we have been confronted with accusations that Esgro is failing to proceed in good faith. If necessary, your Honor, -- frankly, I don't think it is -- Mr. Sherwood could come to New York and Mr. Sherwood can give his version of the facts. Mr. Shelton's gratuitous statement at the conclusion of his argument as to the necessity for taking or seeking sanctions in the California Superior Court are pure hearsay and mere unilateral statements. It's the first I have heard of them and frankly, I think if it's going to be pertinent to this application, Mr. Sherwood should have the opportunity to respond.

Secondly, your Honor, the reply affidavits which were just submitted to your Honor by Mr. Shelton were given to me at 25 after two this afternoon in this courtroom. I haven't had a chance to really read through them. I did read Mr. Shelton's affidavit where it does state there are certain contradictions between Mr. Sherwood's affidavit and Mr. Holtzman's affidavit. The only thing I could say to that, yor Honor, is that

Mr. Sherwood indicated to me on the telephone that before forwarding to me his affidavit, he had conferred on the telephone with Mr. Holtzman to verify the substance of what he was putting into his affidavit. It's possible that -- I understand there was no transcript of this proceeding in the California Superior Court. It was a matter that took place approximately a month ago. Perhaps memories are somewhat different. But in any event, your Honor, I don't think it's pertinent.

At the trial of the adversary proceeding, your Honor, it was estimated by Mr. Holtzman that it would probably take about eight months to get a trial date in the Superior Court of California, assuming the parties were successful in obtaining a preference. We submit that that goal has been exceeded. The date of November 29th represents a trial date in six months of the time of the adversary proceeding before this Court. As far as we perceive it, your Honor, we are two months ahead of the projected schedule.

Additionally, your Honor, at the trial of the adversary proceeding, it was stated by Mr. Holtzman, California counsel for the trustees, that it would take six to eight weeks of trial time. It was estimated by Mr. Sherwood that it would take between four to six weeks of trial time.

Mr. Shelton in his affidavit, his original affidavit in support of this application, blithely states that a trial can be had in two weeks. Frankly, your Honor, I think that we must defer to the judgment of the two attorneys in California who are most familiar with the case, who have been living with the case for the past three years, and with all due respect to Mr. Shelton's judgment, your Honor, I think that this Court must defer to the judgment of Messrs. Holtzman and Sherwood as to that particular point.

Your Honor, it seems to me that

the trustees are in essence engaged upon a goal of trying to get additional bites at the apple. I have heard nothing new here today from Mr. Shelton. The same arguments as to the magnitude of the claim, the same arguments as to the importance of a quick resolution of this claim to the reorganization, your Honor, no one can dispute that it is a substantial claim, no one can dispute that it will have some impact on the reorganization case.

Nonetheless, your Honor, it must be recalled that at the trial of the adversary proceeding, the trustee, Professor Crowley, testified that there were an additional, in excess of $30 million in claims that also had to be resolved in addition to the Esgro claim, and that those claims were nowhere -- it appeared that those claims were nowhere near to resolution at that time.

So that isn't the only thing that

is holding up this reorganization case.

Not only that, your Honor, but the trustees have continuously through this reorganization proceeding proffered the same argument in opposition to other parties' applications to modify the stay. If your Honor will recall, in December the Transit Casualty case, the same argument was proffered by the trustees. The trustees at that time said that if nothing unforeseeable should happen, we will have a plan filed in six months. Your Honor, those six months have passed. Nothing unforeseen has happened. Esgro's claim has been on file with this Court for in excess of a year and a half. It seems to me that any time anyone comes into this Court to modify the stay, they are subject to attack on the basis of that argument.

It seems to me that this Court closely examined that argument at the trial of the adversary proceeding, reached its conclusion, made its findings of fact, rendered its conclusions of law and entered an order modifying the stay.

Your Honor, this motion today is nothing but an indirect collateral attack on this Court's order of May 26. Your Honor, I respectfully submit that had the trustees felt your Honor was erroneous at that time, their remedy was to take an appeal. They failed to do so. The time to do so has expired, and for those reasons I believe their motion today should be dismissed in all respects and that Esgro should be granted its costs and reasonable attorneys' fees in connection with the defense of this motion.

Thank you, your Honor.

THE COURT: Mr. Feller.

MR. FELLER: Your Honor, we, too, have examined closely the two orders that have been entered, and it seems to be rather clear from a study, from a reading of those orders, that the orders were, in effect, interlocutory orders

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Your Honor properly in the exercise of caution, being fully aware of the magnitude and significance of the Esgro claim, was desirous of not being precipitous in rendering a determination on the merits of the question as to whether or not the stay should be ultimately lifted and in that regard, your Honor had urged the parties to take appropriate steps out in California to ascertain as to whether an advance in the trial date can be procured and ordered the parties to report back to the Court in that regard by July 8th.

Those steps were taken and the results are before the Court in the form of affidavits, and without getting involved in disputed aspects, it seems clear that at the earliest a trial can be had on November 29th, and I emphasize "at the earliest."

I don't think that it is disputed that a trial of a claim of this magnitude perforce must hinder, delay and be a burden on the administration of this Chapter X estate. I can't conceive of a situation in a Chapter X context wherein a particular claim, because of its sheer magnitude and importance, deters formulation of a plan of reorganization and what can be more of a hindrance on the administration of a Chapter X estate. I mean, surely this Court, the trustees, the commission have urged throughout that these proceedings be administered in an expeditious fashion and should this matter proceed in California, I seriously believe we will have untold delay, and putting aside for the moment, your Honor, the question of delay, I think the Court should also consider its own jurisdiction in this matter. There is a Section in Chapter X, Section 197, which gives this Court jurisdiction to summarily determine objections to claims. I mean, obviously the statute sought to center the administration of a Chapter X estate in one court, and that is this

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Court, the Chapter X court.

I don't think it would be appropriate for the debtor herein, Interstate, to have, in effect, a determination of solvency or insolvency to be ascertained or determined by a State court out in California. A determination of this nature goes to the very, very crux, as Mr. Shelton indicated, to the formulation of a plan. The extent, if any, of public participation will revolve upon a finding of solvency, and obviously a determination of a close-to-$40-million claim is going to have most significant bearing on that question.

I thus would urge the Court that based upon the developments since the initial trial on the motion to lift the stay and the indication that at the earliest date a trial can be had in this matter is not before November 29th, that this Court do set a trial date as soon as possible. We, of course, are

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also well aware of the massive burden that your Honor is laboring under, but some way must be found wherein this claim can be determined in a fair and expeditious fashion.

THE COURT: How long do you think the trial is going to take, or have you given this any consideration?

MR. FELLER: I think this probably -- and Mr. Shelton can correct me if I'm wrong. I don't speak from personal knowledge.

I would think that the duration of this trial would depend upon whether both the cross-claim and the -- both claims out in California were considered by this Court. I believe Mr. Shelton's estimate that the trial would take two weeks is based upon merely a trying of the expungement of the Esgro claim.

THE COURT: But do you recall the two men who are in charge of this directly in California testified that it would run between four and eight weeks?

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MR. FELLER: I think that was premised upon a trial of the whole package, but I'm not sure.

THE COURT: No, no. The man who gave the shorter estimate indicated that it would be necessary to try 90 percent, even trying the shorter package than the longer package.

Have either of those persons retracted from that estimate in the affidavits before me, Mr. Shelton?

MR. SHELTON: No, your Honor, but your Honor --

THE COURT: I'm curious as to why you feel it is only going to take two weeks when the two attorneys who are directly involved have estimated between four and eight weeks.

MR. SHELTON: If your Honor please, as far as my office is concerned, we regard ourselves as the primary attorney in this matter. Mr. Holtzman is not the primary attorney, and it is our judgment, and I represent this to the Court, that if

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we try this case here, the proof of claim that's been filed by Esgro, if that's the only thing that's tried, it can be tried in two weeks without too much difficulty. That's my estimate, your Honor.

THE COURT: Incidentally, is discovery completed at the present time?

MR. SHELTON: Oh, no, your Honor.

THE COURT: Well, please tell me. Is there any contention that the judges in the State of California are incompetent to supervise discovery in the action out there?

MR. SHELTON: I don't make that contention that they are incompetent.

THE COURT: Well, isn't this motion premature, at least until discovery is completed?

MR. SHELTON: No, your Honor, because if your Honor sets a trial date, discovery is going to be finished because then everybody has got to know they have got to meet it. What's happened so far --

THE COURT: I am at a loss to understand why you feel that I'm going to be able to whip the parties into shape for trial more expeditiously than a competent court in the State of California can do it?

MR. SHELTON: My judgment is predicated on the fact that all my life I have spent litigating claims and when the judge sets a trial date, that's it, there are no more delays. Your Honor, I tell you that we haven't commenced oral depositions until tomorrow and why? Because Mr. Esgro is just not around.

THE COURT: There will be all sorts of motions involved in the discovery process between now and the time that it is actually ready for trial, right?

MR. SHELTON: I tell your Honor that we are going to have to go to California now and make a motion to do something in view of these answers to the interrogatories that have been served.

THE COURT: Can't the lawyer out there handle that?

MR. SHELTON: No. I think we are more familiar with this case than Mr. Holtzman has ever been. Your Honor has got to understand --

THE COURT: Wait a minute.

MR. SHELTON: I'm sorry, I apologize.

THE COURT: That's all right. At this point you are just rehashing the original adversary proceeding.

MR. SHELTON: I don't want to do that.

THE COURT: That's what you're trying to do, and I'm not going to let you.

We do know what the calendar condition is in California; is that correct?

MR. SHELTON: That's correct.

THE COURT: You suggest going to Judge Cannella, asking him to give you the first available minimum of two weeks, correct?

MR. SHELTON: That's correct.

THE COURT: Have you checked Judge Cannella's calendar?

MR. SHELTON: I wouldn't do it unless your Honor permitted me to do so.

THE COURT: I have no authority to prevent you from making inquiry of any Court in the world as to what the availability is.

Have you made any inquiry as to my calendar situation?

MR. SHELTON: No, your Honor, I have not.

THE COURT: I have set aside four weeks' vacation this year and that is the last two of July and the last two of August, and I'm now in the second of my vacation and I have tomorrow and I have Thursday. This is the first week of my vacation. All this should be on the record. I now have a current caseload of approximately 1,000 cases. Only 15 percent of them are non-consumer cases, they are Chapters X or XI. I have got

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R.Hoe, I have got Beck Industries now, I have a raft of SIPC cases. Each of those cases generates sub-cases in the sense of controverted proceedings. We are now setting down matters in one of the SIPC cases -- well, I'm opening October 13th, Havener Securities, a SIPC case.

In Mangel's Stores, one of the major Chapter XI's, they have been taking day after day after day as they are open in my book. They go into October 30th.

Now, even assuming that your optimistic prognosis is correct that this case will only take two weeks, that is a factor to be considered.

MR.SHELTON: I agree, your Honor. I agree. I join in the problem because I think it is a terrible burden on you.

THE COURT: I'm not complaining. I am under no contract. I can quit any time I want. I don't want this to sound like a pity pitch. But I want the record of these proceedings to be abundantly clear that what the parties are talking about at the present time is which forum can most expeditiously try this case. I don't have any brief on it. I don't know whether you have a brief prepared. I don't know whether Mr. Zirinsky does. There are any number of cases with respect to how happily the Bankruptcy Court's calendar can be adapted for the trial of lengthy cases. This is one case out of a thousand that I have, and if you want to take at least two weeks of calendar time, I just don't know where I am going to be able to handle the odds and ends of minutiae that come up on a daily basis with respect to all of the other cases.

MR. SHELTON: Your Honor, there is no one who appreciates that problem more than I do, and I know it because I have been here that often and I have seen what happens to your Honor, and no one in this courtroom who has been around thinks any differently.

THE COURT: Then I am at a loss to

understand how you can say that it can be reached for a full, at least two-week trial earlier than it can be reached in California.

Now, I have already passed on the question where pretrial is going to be had, and that's to take place in California. As Mr.Zirinskypoints out, its an attempt to rehash that portion of the adversary proceeding that I have already ruled on. I think it is premature to fix any court as the place for ultimate trial, at least until discovery has been completed.

MR. SHELTON: It's been my experience,your Honor, that if we let this thing lag like we are doing, what's going to happen is that the case will never get tried this year.

THE COURT: I don't know who is letting it lag. If your side in California is being dalatory, you can shake them up. If the other side is -- and I mentioned this at the time of the adversary proceeding -- if the plaintiff in California begins to lag, then I will keep my continuing review over the stay before myself, and if they begin to drag their heels, come back and show me that they are draggin their heels and then I will consider whether it would be more prudent to try the case here in New York.

MR. SHELTON: Would your Honor permit me to find out from Judge Cannella whether or not he's got time available? I would not go there without either Mr. Zirinsky's permission or your Honor's permission. I would not do it ex parti.

THE COURT: I think, Mr. Shelton, it is almost facetious to say that. The District Judges are so overburdened with work that they refer these matters to Bankruptcy Referees who have more time to handle them. I think that this is the prime consideration for the reference of cases.

MR. SHELTON: Your Honor, that might

be true insofar as most administrative matters are concerned, and some matters of substance, but it seems to me quite clear that the bankruptcy court, at least in this District, is certainly not in a position to try any lengthy adversary proceedings. It just isn't.

THE COURT: I decline to be put in any position of suggesting to any party that they go to the Judge who referred this case to me to ask him whether he's prepared to take back part of the reference. You, of course, are free to make any inquiry you want of Judge Cannella. But you certainly don't need my permission or Mr. Zirinsky's permission to do that.

MR. ZIRINSKY: Your Honor, to make the record complete, I would like to point out paragraph 6 of Mr. Sherwood's affidavit:

"Counsel for Esgro will be prepared to commence trial on this matter in the Los Angeles Superior Court on

November 29, 1976..."

I would also like to direct the Court's attention to paragraph 4 of Mr. Sherwood's affidavit, wherein it is stated that at the time of the application to the California Superior Court for a trial preference, Mr. Sherwood suggested to Mr. Robert Holtzman and to Mr. Daniel Carroll that it would be useful to expedite discovery and in order to assure the earliest possible trial date for us to agree to and request that this matter be assigned to one Superior judge for all purposes.

If this were done, for instance, there would likely be a better assurance that this case would be tried on the date set for trial since we would have a commitment of a particular trial judge for that purpose.

Counsel for debtors did not pursue the suggestion.

I would also like to point the Court's attention --

THE COURT: of course, I have only had a chance, as you've noticed, to glance through these papers while listening to arguments. It's a technique that you have to develop in order to at least stand still in this court.

But let's address ourselves to that, Mr. Shelton, and Mr. Feller.

"Counsel for debtors did not pursue this suggestion."

Are you aware of such suggestion?

MR. SHELTON: I am now. When I read the affidavit I was, and we are not yet sure, after consultation with Mr. Holtzman, that that's the most expeditious way of doing it.

THE COURT: So why not give it a try?

MR. SHELTON: Because we may be better off doing it this way, your Honor, and we are considering that.

In conclusion, may I say a few words?

THE COURT: Certainly. I have

all afternoon.

MR. SHELTON: I do want the record to indicate that Mr. Zirinsky did receive the two affidavits that he referred as being served on him just a few minutes ago, last night. I saw that Mr.Holtzman's affidavits went over to your office by hand.

MR.ZIRINSKY: I have been on vacation. I came back for this hearing today.

MR. SHELTON: I'm very sorry.

MR. ZIRINSKY: I did check my mail. I did not see it. I apologize.

MR. SHELTON: It was delivered by hand last night.

MR. ZIRINSKY: I did not see it.

MR. SHELTON: I am not going to rehash anything. I don't want to. I think that I have said all I can say. I think that if we go to trial in California, even on November 27th or 28th, whenever the California court is fixed, it is a substantial imposition on the rights of creditors here, and it will hinder the reorganization plan.

THE COURT: Let me ask you this: In Interstate, how many stays have been vacated to permit the trial of litigation in plenary suits, approximately? Since we are talking for the record, let's make a record here to the extent you will be done at least partially. I don't want the record left with the flavor that it is unusual to permit plenary suits to continue because I can simply state for the record it has been my experience over the last 13 years that in both Chapters X and XI, when there is a large litigation, protracted, complicated litigation, it's tried in courts of plenary jurisdiction. It's simply virtually impossible for the Bankruptcy Court to set aside such large blocks of time to handle particular cases in particular reorganizations. We just do not have that many days, even in a full 365-day year.

MR. SHELTON: I will answer your question as directly as I can.

Aside from motions to lift stays to enforce liens, which this case is not, the only case I know of or that I can recall offhand where there has been a lifting of a stay is the transit case, which Weil, Gotshal made a motion on, and I don't think that stay, if my memory is correct, has been lifted completely.

Is that correct, Mr. Zirinsky?

MR. ZIRINSKY: I don't know, Mr. Shelton.

MR. SHELTON: That's the only other case that I know of.

If your Honor would say that all the claims have to be tried someplace else, you know, what are we having a reorganization for?

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THE COURT: This is the reductio ad absurdam that you are setting up. Most of the objections to claims tried in this Bankruptcy Court consume approximately a half-day. It's relatively infrequent that we have a full, 1-day trial, or even a two-day trial such as I have outlined for Thursday and Friday of this week.

MR. SHELTON: I agree, your Honor.

THE COURT: But there are just so many days that we have available to ourselves.

All right, anything else?

MR. SHELTON: Nothing.

THE COURT: Mr. Feller, do you wish to add anything?

MR. FELLER: No.

THE COURT: Mr. Zirinsky?

MR. ZIRINSKY: No, your Honor.

THE COURT: I am persuaded that the motion must be, and it is, denied at this time. No cause has been shown to indicate that there should be any relief granted inconsistent with the prior decision on the adversary proceeding. Needless to say, the parties are free to come back at any time that there is a significant change in the circumstances of the case.

I will return these copies to you, Mr. Zirinsky, and see that the originals that were filed are brought out and made a part of the file of today's proceedings.

MR. ZIRINSKY: May I ask one question.

Does your decision speak to our application for costs and attorneys fees in connection with this motion?

THE COURT: Number one, I am unaware of authority for attorneys' fees on a motion of this type, and I am not persuaded that there would be any justification for the award of attorneys' fees. That's ordinarily granted only when the application could be found to be frivolous.

I agree with Mr. Shelton: he doesn't deal in frivolity. I believe that he is firmly convinced that his position is correct, and the costs, of course, simply would be the cost of the transcript, and that's in the discretion of the Court, and I see no reason why even that should be assessed against the moving party.

(Whereupon, the matter was closed.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., Debtors.	Reorganization Nos. 74 B 614-802, Inclusive

ORDER DENYING APPLICATION OF TRUSTEES - CLAIM OF ESGRO, INC., CLAIM NO. 7273A

Joseph R. Crowley and Herbert B. Siegel, as Reorganization Trustees, having moved before the Court by Order to Show Cause, dated July 9, 1976, based upon the affidavit of Martin I. Shelton, sworn to July 9, 1976, for an order fixing the time of the trial of the "application to expunge claim No. 7273A of Esgro, Inc., for September 15, 1976, or as soon thereafter as the Court's calendar permits", and a hearing having been held before the Court on July 20, 1976, and the appearances of interested parties having been noted in the record, and upon all of the proceedings had before the Court including, without limitation, the adversary proceeding commenced in these reorganization cases by Irving Sulmeyer, as Receiver for the estate of Esgro, Inc., a debtor in Chapter XI, as plaintiff against the Reorganization Trustees, as defendants, and the trial had before the Court in that adversary proceeding on May 21, 1976, the order dated May 26, 1976, the further hearing had before the Court upon the application of the

Reorganization Trustees on June 4, 1976, and the order dated June 16, 1976 in connection therewith, and after due deliberation and sufficient cause appearing therefor, it is

ORDERED, ADJUDGED, DECREED AND FOUND as follows:

1. By order dated May 26, 1976, upon the application of Irving Sulmeyer, as Receiver for the estate of Esgro, Inc., a debtor in Chapter XI ("Sulmeyer"), the automatic stay pursuant to Chapter X Rule 10-601 was modified so that (a) the parties could proceed and were directed to proceed at the earliest possible time to make an appropriate application to the Superior Court of the State of California, County of Los Angeles, for an order advancing the trial date of the action pending in that Court entitled White Front Stores, Inc., et al., Plaintiffs v. Esgro, Inc., et al., Defendants, Esgro, Inc., et al., Cross-Complainants v. White Front Stores, Inc., et al., Cross-Defendants, Case No. C50105 (the "California Action"), (b) all discovery and other pre-trial proceedings in both the reorganization cases and the California Action be conducted and completed on an expedited basis and be used in either of such proceedings, and (c) the parties report to the Court on or before July 8, 1976 for the purpose of advising the Court as to the progress of discovery proceedings and the result of the application to the aforesaid Superior Court

2. After hearing on June 4, 1976, it was ordered that all further pre-trial discovery and inspection relating to the Trustees' objection to Esgro, Inc.'s ("Esgro") claim and the

California Action be conducted under the auspices and control of the Superior Court of the State of California, County of Los Angeles (order dated June 16, 1976).

3. On June 28, 1976, a hearing was held before the Master Calendar Department of the Superior Court of the State of California, Los Angeles County, in connection with the California Action and as required by the order dated May 26, 1976 at which the attorneys representing the Reorganization Trustees and Esgro appeared.

4. As a consequence of the hearing held before the aforesaid Master Calendar Department, and pursuant to agreement between Robert L. Holtzman, Esq. of the law firm of Loeb & Loeb of Los Angeles, California, as attorneys for the Reorganization Trustees, and Arthur L. Sherwood, Esq. of the law firm of Gibson, Dunn & Crutcher of Los Angeles, California, as attorneys for Esgro, the trial date for the California Action was set down for November 29, 1976.

5. At the trial held before the Court on May 21, 1976, Robert Holtzman testified to the effect that "the greatest possibility" for trial of the California Action would be "in about eight months" [Stenographic transcript, May 21, 1976, page 178].

6. Mr. Holtzman also testified that he estimated it would take between six to eight weeks of trial to complete the California Action [Stenographic transcript, May 21, 1976, page 185].

7. The trial of the California Action will commence in less than five months from the date hereof.

8. No prejudice, harm or disability is incurred by the Reorganization Trustees and the reorganization cases by modification of the automatic stay under Chapter X Rule 10-601 so as to allow the prosecution and trial of the California Action.

9. The prosecution and trial of the California Action as authorized by the Court is in the interests of justice and convenience of the parties and potential witnesses.

10. The application of the Reorganization Trustees, as represented by the Order to Show Cause dated July 9, 1976, be, and the same hereby is, denied in all respects, with prejudice and without costs.

Dated: New York, New York
July 23, 1976

s/Edward J. Ryan
Bankruptcy Judge

Dated:

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ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: ....

INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 ______________________

CORPORATE VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 ______________________

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s)
for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19 ______________________

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK, COUNTY OF New York ss.:

Mark A. Ribaudo
being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
[illegible] Lakeview Ave., Lynbrook, L.I., N.Y.

That on the 22 day of July 1976 at No. 750 Third Ave., New York, New York
deponent served the within Notice of Settlement of Counter [illegible]

upon Zalkin, Rodin & Goodman [illegible] leaving a copy thereof at said firm's offices.
the herein, by ~~delivering a true copy thereof to h~~ personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this 22nd day of July 1976

Mark A. Ribaudo
MARK A. RIBAUDO

[illegible]
Notary Public, State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 1978

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In re :

INTERSTATE STORES, INC., formerly :
known as INTERSTATE DEPARTMENT
STORES, INC., et al., :

Debtors. :

- x

REORGANIZATION

Nos. 74 B 614-802,
Inclusive

NOTICE

NOTICE IS HEREBY GIVEN that Joseph R. Crowley and Herbert B. Siegel, Trustees in reorganization of Interstate Stores, Inc. et al. appeal to the United States District Court for the Southern District of New York (Honorable John M. Cannella, United States District Judge) from the order of the Honorable Edward J. Ryan, Bankruptcy Judge, dated and filed July 23, 1976 which denied the Trustees' application for an order setting down the trial before this Court of the Trustees' application to expunge claim #7273A of Esgro, Inc. in the amount of $38,758,972 for September 15, 1976 or as soon thereafter as the Court's calendar permits.

The parties to the order appealed from and the names and addresses of their respective attorneys are as follows:

Joseph R. Crowley and Herbert B. Siegel
Reorganization Trustees
c/o Shea Gould Climenko & Casey
330 Madison Avenue
New York, New York 10017

Irving Sulmeyer, as Receiver for the
Estate of Esgro, Inc.
c/o Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

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United States Securities and
  Exchange Commission
c/o Marvin E. Jacob
Associate Regional Administrator
New York Regional Office
26 Federal Plaza
New York, N.Y. 10007

Bankers Trust Company, Chemical Bank,
  Citibank, N.A. (formerly known as
  First National City Bank),
  Manufacturers Hanover Trust Company,
  The Chase Manhattan Bank, N.A.,
  Bank of America National Trust
  and Savings Association,
  International Commerical Bank Limited
  and the Toronto-Dominion Bank
c/o Zalkin, Rodin & Goodman
750 Third Avenue
New York, New York 10017

Dated: New York, New York
July 28, 1976

SHEA GOULD CLIMENKO & CASEY

By____________________
A Member of the Firm
Attorneys for Joseph R. Crowley
and Herbert B. Siegel
Reorganization Trustees
330 Madison Avenue
New York, New York 10017
(212) 661-3200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In re :

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., :

Debtors. :

- x

REORGANIZATION

Nos. 74 B 614-802,
Inclusive

APPELLANT'S DESIGNATION OF RECORD AND STATEMENT OF ISSUES

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, Reorganization Trustees of Interstate Stores, Inc. et al. (the "Trustees") having filed a Notice of Appeal on July 28, 1976 hereby designate the following for inclusion in the Record on Appeal and set forth a Statement of Issues to present on appeal:

DESIGNATION OF CONTENTS OF RECORD

1. Proof of Claim #7273A dated August 27, 1974 (the "Esgro Claim") filed by Esgro, Inc. and Irving Sulmeyer, Receiver of the Estate of Esgro, Inc. ("Sulmeyer").

2. Notice dated April 9, 1976 and application of the Trustees annexed thereto objecting to, and requesting the expunging of, the Esgro Claim.

3. Notice to take deposition of Frances J. Esgro dated April 9, 1976.

4. Interrogatories to Claimant Esgro, Inc. dated April 9, 1976.

5. Notice To Admit dated April 9, 1976 to Esgro, Inc.

6. Notice to take deposition of Harry Epstein dated May 10, 1976.

7. Notice to take deposition of Ron Wood dated May 10, 1976.

8. Application for Order Staying Discovery dated May 11, 1976 made by Weil, Gotshal & Manges as attorneys for Sulmeyer ("Attorneys for Sulmeyer").

9. Summons and Notice of Trial issued May 11, 1976 by Edward J. Ryan, Bankruptcy Judge ("Bankruptcy Judge Ryan"), together with Complaint under Rule 10-601 for Modification of Stay of Suits dated May 10, 1976 made by the Attorneys for Sulmeyer.

10. Answer to Complaint under Rule 10-601 made by Shea Gould Climenko & Casey, attorneys for the Trustees ("Attorneys for the Trustees").

11. Transcripts of hearings held on May 21, 1976 and May 26, 1976 before Bankruptcy Judge Ryan on the Complaint to Modify the Stay.

12. Stipulation dated May 21, 1976 between the Attorneys for Sulmeyer and the Attorneys for the Trustees relating to certain documents, together with such documents.

13. Order of Bankruptcy Judge Ryan dated May 26, 1976 relating to the Modification of the Stay.

14. Order To Show Cause presented to Bankruptcy Judge Ryan on June 3, 1976 and the annexed affidavit of Daniel L. Carroll, Esq. of the Attorneys for the Trustees sworn to on June 3, 1976 requesting the striking of the Esgro Claim.

15. Transcript of the hearing held June 4, 1976 before Bankruptcy Judge Ryan on the application to strike the Esgro Claim.

16. Order of Bankruptcy Judge Ryan dated June 16, 1976 denying the application of the Trustees to strike the Esgro Claim.

17. Notices of adjournment of deposition of Harry Epstein dated June 7, 1976 and June 22, 1976.

BEST COPY AVAILABLE

18. Notices of adjournment of deposition of Ron Wood dated June 7, 1976 and June 22, 1976.

19. Notice of adjournment of deposition of Frances J. Esgro dated July 1, 1976.

20. Order To Show Cause of Bankruptcy Judge Ryan dated July 9, 1976 and the annexed affidavit of Martin I. Shelton, Esq. of the Attorneys for the Trustees sworn to on July 9, 1976 requesting that the trial of the Esgro Claim be set before this Court on September 15, 1976, or as soon thereafter as the Court's calendar permits.

21. Affidavit of Bruce R. Zirinsky, Esq. of the Attorneys for Sulmeyer sworn to on July 15, 1976 in opposition to the Trustees' application.

22. Affidavit of Arthur L. Sherwood, Esq. sworn to on July 14, 1976.

23. Supplemental affidavit of Martin I. Shelton, Esq. sworn to on July 20, 1976.

24. Transcript of the hearing held July 20, 1976 before Bankruptcy Judge Ryan on the application for a trial date.

25. Order of Bankruptcy Judge Ryan dated July 23, 1976 denying the Trustees' application to set a trial date (the Order ap[illegible]ed from).

STATEMENT OF ISSUES

Was the Order of Bankruptcy Judge Ryan denying the Trustees' application pursuant to Rule 903 of the Rules of Bankruptcy Procedure and Local Bankruptcy Rule X-14(e) to set down for trial the Trustees' objection to claim #7273A of Esgro, Inc. (the "Esgro Claim") in the amount of $38,958,972 for September 15, 1976, or as soon thereafter as the Court's calendar permits, where the effect of such order is to continue in effect the Court's prior orders dated May 26, 1976 and June 16, 1976 modifying this Court's stay order dated June 13, 1974, thereby permitting the trial of such objection to take place not earlier than November 29, 1976 in California under the auspices of the Superior Court of Los Angeles County, California, erroneous under the following circumstances:

1. The Esgro Claim is by far the largest claim filed in this proceeding;

2. The Esgro Claim represents over 50% of the amount of disputed claims remaining in this proceeding;

3. A determination of the solvency of the debtors as is required under Sections 179 and 216 of the Bankruptcy Act cannot be made until the Esgro Claim is resolved;

4. The plan of reorganization cannot be formulated and filed with the Court until the Esgro Claim is resolved;

5. If the debtors are solvent, post-petition interest continues to accrue on the outstanding claims of about $1,000,000 a month;

6. The trial of the objection to the Esgro Claim before this Court will involve less issues and less time than the trial in the California Court;

7. A prompt resolution of the Esgro Claim is in the best interests of the debtors, creditors and, probably, the public shareholders.

Dated: New York, New York
July 28, 1976

SHEA GOULD CLIMENKO & CASEY

By ______________________
A Member of the Firm
Attorneys for Joseph R. Crowley
and Herbert B. Siegel
Reorganization Trustees
330 Madison Avenue
New York, New York 10017
(212) 661-3200

TO: Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Securities and Exchange Commission
26 Federal Plaza
New York, New York
Attn.: Jerome Feller, Esq.

Zalkin, Rodin & Goodman
750 Third Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,

Debtors.

Reorganization Nos. 74 B 614-802 Inclusive

COUNTER-STATEMENT OF ISSUES ON APPEAL PURSUANT TO BANKRUPTCY RULE 807

Irving Sulmeyer, as Receiver of the Chapter XI Estate of Esgro, Inc., and Esgro Inc., submit the following counter-statement of issues on appeal pursuant to Bankruptcy Rule 807 in respect of the appeal filed by Joseph R. Crowley and Herbert B. Siegel, as Reorganization Trustees, from an order of the Bankruptcy Court dated July 23, 1976:

1. Did Bankruptcy Judge Edward J. Ryan abuse his discretion in determining that (a) no prejudice, harm or disability is incurred by the Reorganization Trustees and the reorganization cases by modifying the automatic stay under Chapter X Rule 10-601 so as to allow the prosecution and trial of the pending action in the Superior Court of the State of California, County of Los Angeles, entitled White Front Stores, Inc., et al., Plaintiffs v. Esgro, Inc., et al., Defendants, Esgro, Inc., et al., Cross-Complainants v. White Front Stores, Inc., et al., Cross-Defendants, Case No. C50105 (the "California Action"), which trial is to

commence on November 29, 1976; and (b) that the prosecution and trial of the California Action in the Superior Court of the State of California is in the best interests of justice and convenience of the parties and potential witnesses.

2. Are the findings of fact made by Bankruptcy Judge Edward J. Ryan including (a) Robert L. Holtzman, Esq. of the law firm of Loeb & Loeb of Los Angeles, California, as attorneys for the Reorganization Trustees and Arthur L. Sherwood, Esq. of the law firm of Gibson, Dunn & Crutcher of Los Angeles, California, as attorneys for Esgro, Inc., agreed to a trial date of November 29, 1976 for the California Action; (b) a trial of the issues joined would take between six to eight weeks of trial; and (c) the trial of the California Action will commence in less than five months from July 23, 1976, clearly erroneous?

Dated: New York, New York
August 4, 1976

WEIL, GOTSHAL & MANGES
Attorneys for Irving Sulmeyer,
as Receiver for the Chapter XI
Estate of Esgro, Inc., and
Esgro, Inc.
767 Fifth Avenue
New York, New York 10022

By ______________________
A Member of the Firm

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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In the matter of

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.

74 B.614-802

-----------------------------------x

Before:

HON. JOHN M. CANNELLA,

District Judge.

New York, August 3, 1976,
10:00 a.m.

APPEARANCES:

WEIL, GOTSHAL & MANGES, ESQS.,
Attorneys for Irving Sulmeyer, Receivers, and Esgro, Inc.
BY: BRUCE R. ZIRINSKY, ESQ.,
LAWRENCE MITTMAN, ESQ., of Counsel

SHEA, GOULD, CLIMENKO & CASEY, ESQS.,
Attorneys for Trustees
BY: MARTIN I. SHELTON, ESQ.,
DANIEL CARROLL, ESQ., of Counsel

MS. MERYL WIENER, ESQ.,
Attorney for SEC

ZALKIN, RODIN & GOODMAN, ESQS.,
Attorneys for Senior Institutional Lenders
BY JAMES D. GLASS, ESQ., of Counsel

ALSO PRESENT:

JOSEPH CROWLEY

THE COURT: Have you talked over what date would be agreeable to you or are you still at odds?

MR. SHELTON: I am ready to go any day.

THE COURT: What is an agreeable date?

MR. SHELTON: This Friday?

THE COURT: I understand that the date we fixed or that my office fixed is too precipitous to the one side. What is nonprecipitous?

MR. ZIRINSKY: I just returned from vacation. My name is Bruce Zirinsky. I was advised by Mr. Mittman, my associate, that your office had advised him that briefs would be due on Friday and the appeal would be argued on Monday.

THE COURT: Yes. What is agreeable to you?

MR. ZIRINSKY: We would like the opportunity to have the appellant's briefs ahead of time. We would like to be able to respond to their briefs.

THE COURT: Are your briefs ready?

MR. SHELTON: I don't think we can get them ready before Thursday or Friday.

THE COURT: Tell me whatever date. As a matter of fact, I will be on my vacation but I will come in that day. Just tell me when it is. How much time do you want?

MR. SHELTON: I can have briefs here on Friday.

THE COURT: They will give you the briefs on Friday.

MR. ZIRINSKY: I would like a week to respond.

THE COURT: Fair enough. The 13th. If there is any necessity for a hearing -- I assume you are going to put everything in your papers -- I will fix a date and I will come in.

MR. SHELTON: Could it be possible to hold a hearing before you leave for vacation even though his brief isn't ready and we can set forth our positions?

THE COURT: But then you will want to submit further papers after that.

MR. SHELTON: Only his brief.

MR. ZIRINSKY: It would be advisable for the court to have the opportunity to review --

THE COURT: I know about this matter and I know what it is about now, actually. I don't know what the briefs are going to do to help me any more than that. I am aware of what it is about. I have lived with this case a long time. My office has too.

MR. ZIRINSKY: I think the findings below by Judge Ryan are very clear. The burden is on the appellants --

THE COURT: If you are prepared to argue it now I will hear your arguments now.

MR. ZIRINSKY: I would like --

THE COURT: If you want to make a speaking motion, fine.

MR. ZIRINSKY: I would like an opportunity to present my brief to the court prior to oral argument so the court may be apprised of our position on the appeal and so that oral argument may be used to amplify the brief as opposed to spending time summarizing what is going to be in the brief. I feel that is the most useful way to proceed.

THE COURT: I don't know that this is so complicated. What is so complicated about it?

MR. ZIRINSKY: I don't know.

THE COURT: There is nothing to know. You have a claim for 33 million plus five punitive damages for whatever it is, 38 million, and the question is should it proceed in California or here, and essentially that is what is involved.

What else are you going to talk about?

MR. ZIRINSKY: We are going to talk about whether or not, in light of all the circumstances, Judge Ryan abused his discretion in modifying --

THE COURT: I just reversed him only recently, so I am not interested in what Judge Ryan thinks or doesn't think about the matter. What I am interested in is expediting this matter and getting this report in that the trustee must hand in with some expedition. That is what I am interested in.

MR. ZIRINSKY: With joint agreement of California counsel for both parties a trial date of September 29th --

THE COURT: I couldn't care less what they agreed. I have the obligation of this. They don't have the obligation. They are adversaries. They want to accomplish some purpose. I only want to accomplish one purpose, to get this thing expeditiously done, well done and that is it. I have sat on some of those dates they are going to try cases. This is my 28th year now. I didn't come in the door yesterday. I have seen some of these things where jqa

I used to hold my breath, the Supreme Court is going to decide, they heard the argument, I have sat on some of those for six, seven months. Upstairs they sit on it 20 months. I am not going to sit around and watch people twiddle their thumbs and contemplate their navels. I am not deciding it. I am telling you only what my interests are.

MR. ZIRINSKY: I think the interests of all parties concerned are to expedite a trial of the disputes. Esgro itself has just recently come out of a Chapter XI proceeding in the Central District of California. I think there are equities on both sides. I think that both parties have indicated throughout this proceeding the inclination and the desire to expeditiously resolve it.

It appears from the testimony adduced before Judge Ryan that the most expeditious hearing of the disputes can be had in the California Superior Court. It has been stipulated by counsel for both sides that the trial will take six to eight weeks to complete and that --

THE COURT: If you want to argue --

MR. ZIRINSKY: I am merely responding to certain comments you made.

THE COURT: You are not responding; you are arguing it. I am willing to hear argument on it and I will decide on the argument.

MR. ZIRINSKY: May we fix a hearing date?

THE COURT: I don't know why there should be a hearing in this. That is what is bugging me. What can you say in your papers that you could not say here orally?

MR. ZIRINSKY: I would like to see the appellant's brief before oral argument.

THE COURT: All papers to be submitted by the 13th of August and if a hearing is necessary I will fix a date after that date.

MR. ZIRINSKY: Trustee's briefs to be filed this Friday?

THE COURT: The 6th. That is this Friday.

MR. ZIRINSKY: Can you serve that by hand?

MR. SHELTON: Why, of course.

Thank you, your Honor.

- -

9/2/76

A 503

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------X

In the Matter :
of :
INTERSTATE STORES, INC., formerly :
known as INTERSTATE DEPARTMENT
STORES, INC., et al., :
Debtors. :

-------------------------------------X

OPINION AND ORDER

74 B 614-802
Inclusive

CANNELLA, D.J.:

The order appealed from is hereby set aside. The parties are directed to proceed in accordance with this opinion.

The Trustees appeal from an order of Bankruptcy Judge Ryan, filed July 23, 1976, denying their motion for a trial of the Trustees' application to expunge Claim No. 7273A (the Esgro claim) beginning September 15, 1976 or as soon thereafter as the court's calendar permits. The effect of this denial is to allow the Esgro claim to proceed to trial before the Superior Court of the State of California, County of Los Angeles, no sooner than November 29, 1976. The court below based its decision primarily on the presently congested condition of its own calendar. It is the opinion of this Court that in light of the magnitude

The next page is A506.

of the Esgro claim, the crucial stage of the reorganization proceedings that has now been reached, the common interest of all the parties in an expeditious liquidation of the Esgro claim, and the slight inconvenience to the claimant in litigating its claim before a court in this district, calendar congestion is an insufficient reason for modifying, with respect to the Esgro claim, the stay of suits entered pursuant to Section 116(4) of the Bankruptcy Act, 11 U.S.C. § 516(4) and Rule 10-601 of the Rules of Bankruptcy Procedure. Even a minor delay at this juncture would place an undue burden on these reorganization proceedings. Thus, the Court finds that the Bankruptcy Court abused its discretion in allowing the Esgro claim to proceed to trial before the California Superior Court rather than schedule an immediate trial in this district.

In order to ensure an expedient resolution of the instant controversy, it is hereby ordered that this Court's reference of the above-entitled matter to the Bankruptcy Court is hereby vacated with respect to the Esgro claim. Furthermore, the parties are directed to proceed with and complete discovery prior to September 27, 1976. A pre-trial order outlining the issues to be tried and delineating the facts that have been stipulated to by the parties shall be filed no later than October 12, 1976. The matter is set down for trial before this Court beginning October 18, 1976 at 10:00 A.M.

SO ORDERED:

John M. Cannella
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
September 1, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed 9/2/76 4:49 P.M.

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC. a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants-Appellants-Appellees.

Reorganization Nos.
74 B 614 - 802,
Inclusive

NOTICE OF APPEAL

Notice is hereby given that Irving Sulmeyer ("Sulmeyer"), as Receiver for the Estate of Esgro, Inc., a Debtor in Chapter XI

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of the Federal Bankruptcy Act, 11 U.S.C. §§701-799, the plaintiff-respondent-appellant, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable John M. Cannella, United States District Judge, dated September 1, 1976, setting aside the order of the Honorable Edward J. Ryan, Bankruptcy Judge, dated July 23, 1976 and setting a trial before this court of the application of defendants-appellants-appellees to expunge the claim of Sulmeyer (Claim No. 7273A), commencing October 18, 1976 at 10:00 A.M.

Dated: New York, New York
September 2, 1976

WEIL, GOTSHAL & MANGES
Attorneys for Irving Sulmeyer, as
Receiver for the Chapter XI Estate
of Esgro, Inc.

By
A Member of the Firm
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

TO: SHEA, GOULD, CLIMENKO & CASEY
Attorneys for Reorganization Trustees
300 Madison Avenue
New York, New York 10017

SECURITIES AND EXCHANGE COMMISSION
26 Federal Plaza
New York, New York 10007

ZALKIN, RODIN & GOODMAN
Attorneys for Certain Institutional Creditors
750 Third Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants-Appellants-Appellees.

Reorganization Nos.
74 B 614-802,
Inclusive
76 - 5029

ORDER DIRECTING REORGANIZATION TRUSTEES TO SHOW CAUSE WHY ORDER OF SEPTEMBER 1, 1976 SHOULD NOT BE SUSPENDED PURSUANT TO FED. R. CIV. P. 62(c)

Upon the annexed affidavit of Bruce R. Zirinsky, sworn to September 8, 1976, for an order suspending the order of the court, dated September 1, 1976 (the "Order"), which, inter alia, set aside the order of the Honorable Edward J. Ryan, Bankruptcy Judge, dated July 23, 1976, pending disposition of the appeal from the Order of Irving Sulmeyer, as Receiver, the above-named plaintiff-respondent-appellant, and sufficient cause appearing therefor, it is

ORDERED that Joseph R. Crowley and Herbert B. Siegel, as Reorganization Trustees, the above-named defendants-appellants-appellees (the "Trustees"), show cause before me in Room 1001, United States Court House, Foley Square, New York, New York on the 15th day of September, 1976, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why the court should not suspend the Order pending disposition of Sulmeyer's appeal therefrom to the United States Court of Appeals for the Second Circuit, as more fully set forth in the annexed affidavit; and it is further

ORDERED that personal service of a copy of this order, on or before 4:00 P.M. on September 10, 1976 and the papers in support thereof, upon Shea, Gould, Climenko & Casey, attorneys for the Trustees, 300 Madison Avenue, New York, New York 10017, and on the Securities and Exchange Commission, 26 Federal Plaza, New York, New York 10017, and on Zalkin, Rodin & Goodman, attorneys for Certain Institutional Creditors, 750 Third Avenue, New York, New York 10017, shall be deemed good and sufficient service of this order and the proceedings to be had thereon; and it is further

ORDERED that answering papers, if any, shall be served by hand upon Weil, Gotshal & Manges, attorneys for Sulmeyer, 767 Fifth

Avenue, New York, New York 10022, no later than ~~two (2)~~ one (1) business days preceeding the return date set forth above.

Dated: New York, New York
September 8 , 1976

Issued: .M.

/s/ John M. Cannella
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants-Appellants-Appellees.

Reorganization Nos.
74 B 614-802,
Inclusive
76 - 5029

AFFIDAVIT IN SUPPORT OF MOTION UNDER FED. R. CIV. P. 62(c) FOR A STAY PENDING APPEAL FROM ORDER OF THE DISTRICT COURT

STATE OF NEW YORK YORK)
) ss.:
COUNTY OF NEW YORK)

BRUCE R. ZIRINSKY, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this court and am associated with the firm of Weil, Gotshal & Manges, attorneys for Irving Sulmeyer ("Sulmeyer"), as Receiver for the Estate of Esgro, Inc. ("Esgro"), a Debtor in Chapter XI of the Bankruptcy Act, 11 U.S.C. §§701-799, the above-named plaintiff-respondent-appellant.

2. I submit this affidavit in support of Sulmeyer's motion under Fed. R. Civ. P. 62(c) for a stay pending Sulmeyer's appeal from the decision and order of this court dated September 1, 1976 (the "Order"), which, inter alia, (i) sets aside the order of the Honorable Edward J. Ryan, dated July 23, 1976 modifying the stay of suits extant by virtue of Chapter X Rule 10-601; (ii) sets a trial before this court of the application of Joseph R. Crowley and Herbert B. Siegel, as Reorganization Trustees (the "Trustees"), to expunge the claim of Sulmeyer (Claim No. 7273A), commencing October 18, 1976 at 10:00 A.M., (iii) directs the parties to complete discovery prior to September 27, 1976; and (iv) directs the parties to stipulate to facts by October 12, 1976.

3. On September 2, 1976, Sulmeyer filed with this court, a notice of appeal from the Order to the United States Court of Appeals for the Second Circuit. A copy Sulmeyer's notice of appeal is annexed hereto as Exhibit 1. On September 3, 1976, Sulmeyer filed with the Court of Appeals, a motion for an expedited appeal under Fed. R. App. P. 2. A copy of the motion, which is presently pending, is annexed hereto as Exhibit 2.

4. Sulmeyer requests that the Order be suspended pending disposition of the appeal, for the following reasons:

(a) Sulmeyer is unable to complete pre-trial discovery by september 27, 1976, the deadline fixed by the Order.

(i) I am informed by California counsel to Sulmeyer, Messrs. Arthur Sherwood and Wesley Howell, members of the firm of Gibson, Dunn & Crutcher, that pre-trial discovery is presently outstanding in the action and cross-action between the parties in the Superior Court of the State of California, County of Los Angeles (the "California Court"). Based upon information which Sulmeyer expects to obtain in outstanding discovery, additional discovery will be required and will not be completed until the end of October 1976.

(ii) Messrs. Sherwood and Howell further advise me that discovery has heretofore been scheduled by Sulmeyer's attorneys in anticipation of a jury trial commencing on November 29, 1976, in the California Court. As the record below indicates, this date was agreed upon by counsel for the respective parties. If the Trustees' objection to Sulmeyer's claim is to be tried before this court, additional witnesses who cannot be compelled to appear in New York will have to be deposed in California, and their depositions used at the trial in lieu of live testimony.

(iii) The scope of discovery and the manner in which the case is to be tried will substantially differ depending on where the case is tried, whether or not before a jury and where rules of procedure and evidence differ, thereby significantly affecting trial preparation.

(b) Sulmeyer will be prejudiced if the trial commences on October 18, 1976, the date fixed by the Order.

(i) The sworn, uncontradicted testimony of California counsel for both Sulmeyer and the Trustees is that a trial will take between five and eight weeks to complete.

(ii) Arthur Sherwood, Esq. and Wesley Howell, Esq., members of the firm of Gibson, Dunn & Crutcher, Los Angeles, California, attorneys for Sulmeyer, are the attorneys who are most familiar with the case and who plan to try the case. Mr. Sherwood advises me that he has a trial in another matter scheduled to commence on November 1, 1976, which he anticipates will take approximately two weeks to complete. Mr. Howell advises me that he has a trial in another matter scheduled to commence on October 15, 1976. It is virtually impossible for either Mr. Sherwood or Mr. Howell to reassign their caseloads without substantial prejudice to the interests of their clients.

(iii) Sulmeyer may be deprived of its right to adequate counsel at the trial unless the Order is suspended, thereby depriving him of his right to due process of law as guaranteed by the Constitution of the United States.

(c) The issues on appeal may be rendered moot unless the Order is suspended.

(i) The issues raised on appeal present significant questions of law relating to substantial rights of the respective parties.

(ii) Because of the shortness of the time constraints imposed by the Order, substantial rights of Sulmeyer may be adversely affected, to his irreparable harm and injury, before the Court of Appeals can render its decision.

5. Sulmeyer's motion for an expedited appeal is presently pending in the Court of Appeals. I have no reason to

believe the motion won't be granted, especially if the Trustees don't oppose the motion. Accordingly, an early disposition of the appeal is likely and the Trustees will not be prejudiced by a suspension of the Order until that time, especially where discovery has not yet been completed.

6. On the other hand, for the reasons stated above, Sulmeyer will be prejudiced if the Order is not suspended pending disposition of the appeal.

7. No previous application for the relief sought herein has been made to this or any other court. The reason Sulmeyer proceeds by order to show cause rather than notice of motion is that unless the Order is suspended, Sulmeyer may fall into default of the provisions thereof and thereby be irreparably harmed.

8. For all of the foregoing reasons, Affiant submits that Sulmeyer's motion should be granted in all respects and the court should suspend the Order pending disposition of Sulmeyer's appeal.

Bruce R.
Bruce R. Zirinsky

Sworn to before me this
8th day of September, 1976.

/s/ David C. Unger
Notary Public

SOUTHERN DISTRICT OF NEW YORK

4511

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants-Appellants-Appellees.

Reorganization Nos.

74 B 614-802,

Inclusive

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Bruce R. Zirinsky, sworn to September 3, 1976, the undersigned

Exhibit 2

of the Federal Bankruptcy Act, 11 U.S.C. §§701-799, the plaint respondent-appellant, hereby appeals to the United States Cou of Appeals for the Second Circuit from the order of the Honora John M. Cannella, United States District Judge, dated September 1976, setting aside the order of the Honorable Edward J. Ryan Bankruptcy Judge, dated July 23, 1976 and setting a trial bef this court of the application of defendants-appellants-appelle to expunge the claim of Sulmeyer (Claim No. 7273A), commenci October 18, 1976 at 10:00 A.M.

Dated: New York, New York
September 2, 1976

WEIL, GOTSHAL & MANGES
Attorneys for Irving Sulmeyer, a
Receiver for the Chapter XI Es
of Esgro, Inc.

By
A Member of the Firm
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

TO: SHEA, GOULD, CLIMENKO & CASEY
Attorneys for Reorganization Trustees
300 Madison Avenue
New York, New York 10017

SECURITIES AND EXCHANGE COMMISSION
26 Federal Plaza
New York, New York 10007

ZALKIN, RODIN & GOODMAN
Attorneys for Certain Institutional Creditors
750 Third Avenue
New York, New York 10017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

INTERSTATE STORES, INC., et al.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES; INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants-Appellants-Appellees.

Reorganization Nos.
74 B 614-802,
Inclusive

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Bruce R. Zirinsky, sworn to September 3, 1976, the undersigned will move before the Honorable Judges of the United States Court of Appeals for the Second Circuit, on behalf of Irving Sulmeyer ("Sulmeyer") as Receiver for the Estate of Esgro, Inc., a debtor in Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 701-799, the plaintiff-respondent-appellant, on the day of September, 1976 at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, under Rule 2 of the Federal Rules of Appellate Procedure for an Order preferring and expediting this appeal from the order of the Honorable John M. Cannella, United States District Judge, dated September 1, 1976, setting aside the order of the Honorable Edward J. Ryan, Bankruptcy Judge, dated July 23, 1976, and setting a trial before the United States District Court for the Southern District of New York of the application of the defendants-appellants-appellees to expunge the claim of Sulmeyer (Claim No. 7273A), commencing October 18, 1976, at 10:00 A.M., and for such other and further relief as is just.

Dated: New York, New York
September 3, 1976

WEIL, GOTSHAL & MANGES
Attorneys for Irving Sulmeyer,
as Receiver for the Chapter
XI Estate of Esgro, Inc.
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

By Michael D. Hess
A Member of the Firm

TO: SHEA, GOULD, CLIMENKO & CASEY
Attorneys for Reorganization Trustees
Defendants-Appellants-Appellees
330 Madison Avenue
New York, New York 10017

SECURITIES AND EXCHANGE COMMISSION
26 Federal Plaza
New York, New York 10007

ZALKIN, RODIN & GOODMAN
Attorneys for Certain Institutional Creditors
750 Third Avenue
New York, New York 10017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

INTERSTATE STORES, INC., *et al*.,

Debtors,

IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

v.

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., a California corporation, WHITE FRONT COSTA MESA, INC., a Delaware corporation, WHITE FRONT DOWNEY, INC., a Delaware corporation, WHITE FRONT THOUSAND OAKS, INC., a Delaware corporation, WHITE FRONT SOUTH SACRAMENTO, INC., a Delaware corporation, WHITE FRONT LA MESA, INC., a Delaware corporation, WHITE FRONT OAKLAND, INC., a Delaware corporation, WHITE FRONT SAN JOSE, INC., a Delaware corporation, WHITE FRONT SUNNYVALE, INC., a Delaware corporation, WHITE FRONT SACRAMENTO, INC., a Delaware corporation, WHITE FRONT PLEASANT HILL, INC., a Delaware corporation, WHITE FRONT FRESNO, INC., a Delaware corporation, WHITE FRONT SOUTH SAN FRANCISCO, INC., a Delaware corporation, WHITE FRONT NEWARK, INC., a Delaware corporation, WHITE FRONT RICHMOND, INC., a California corporation, WHITE FRONT TACOMA, INC., a Washington corporation, WHITE FRONT SEATTLE, INC., a Washington corporation, WHITE FRONT BURIEN, INC., a Washington corporation, and INTERSTATE DEPARTMENT STORES, INC., a Delaware corporation,

Defendants-Appellants-Appellees.

Reorganization Nos.

74 B 614-802

Inclusive

AFFIDAVIT IN SUPPORT OF MOTION UNDER RULE 2 OF THE FEDERAL RULES OF APPELLATE PROCEDURE FOR PREFERENCE OF DETERMINATION OF APPEAL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BRUCE R. ZIRINSKY, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court and am associated with the law firm of Weil, Gotshal & Manges, attorneys for Irving Sulmeyer ("Sulmeyer"), as Receiver for the Estate of Esgro, Inc. ("Esgro"), a Debtor in Chapter XI of the Bankruptcy Act, 11 U.S.C. §§701-799, the plaintiff-respondent-appellant.*

2. This affidavit is submitted in support of Sulmeyer's motion for an order pursuant to Fed.R.App.P. 2, granting a calendar preference and expediting his appeal from an order of the Honorable John M. Cannella, United States District Judge, dated September 1, 1976. I have personal knowledge of the facts set forth herein.

3. On September 2, 1976, Sulmeyer filed a notice of appeal to this Court from Judge Cannella's order which set aside on appeal, the order, decision and findings of fact of the Honorable Edward J. Ryan, Bankruptcy Judge, dated and filed July 23, 1976.

4. Bankruptcy Judge Ryan's order in conjunction with two prior orders dated May 26, 1976 and June 16, 1976, entered after a full trial of an adversary proceeding commenced by Sulmeyer on May 11, 1976, modified the stay of suits in the Interstate Stores, Inc., _et al_., Chapter X Reorganization cases extant by virtue of Bankruptcy Rule 10-601(a), so as to permit the continued prosecution and jury trial of an action and cross-action pending in the Superior Court of the State of California,

---

* The Esgro Chapter XI case was confirmed by order of the United States District Court for the Central District of California, which order became final on June 18, 1976.

County of Los Angeles (the "California Court"), entitled, "White Front Stores, Inc., et al., Plaintiffs v. Esgro, Inc., Triumph Sales, Inc., Francis J. Esgro, et al., Defendants; Esgro, Inc., Triumph Sales, Inc., Cross-Complainants v. White Front Stores, Inc., et al., Cross-Defendants, Case No. C50105 (the "California Lawsuit").

5. On May 11, 1976, Sulmeyer commenced in the Bankruptcy Court an adversary proceeding against Joseph R. Crowley and Herbert B. Siegel, as Reorganization Trustees (the "Trustees"), seeking an order modifying the stay of suits in the Chapter X cases so as to permit the continued prosecution and jury trial of the California Lawsuit.

6. On May 21, 1976, a trial of the adversary proceeding was conducted before Bankruptcy Judge Ryan. At the trial, Bankruptcy Judge Ryan heard sworn testimony of the California attorneys representing Sulmeyer and the Trustees in the California Lawsuit, as well as the sworn testimony of Joseph Crowley, one of the Trustees.

7. The evidence adduced at the trial established that: (a) most of the witnesses having personal knowledge of the facts relevant and material to the California Lawsuit reside in California; (b) parties to the California Lawsuit were not before the Bankruptcy Court; (c) a trial of the Trustees' objection to Sulmeyer's claim in the Bankruptcy Court would determine only the issues raised by the cross-complaint in the California Lawsuit and would leave unresolved the Trustees' principal action in the California Lawsuit; (d) the issues involved in the principal action and the cross-action were closely interwoven; (e) California law governed the disputes between the parties; and (f) most significantly, the parties would obtain a jury trial in the California Court, as guaranteed by the Constitution and

Statutes of the State of California.

8. The only argument proferred by the Trustees in opposition to a modification of the stay, was a contention that a jury trial in the California Court would delay a determination of the $38 million dollar claim of Sulmeyer in the Reorganization Cases, thereby burdening the formulation of a plan of reorganization. In this regard, the Trustees' own testimony established that (a) additional claims of at least $30 million still remained unresolved; (b) no resolution had been reached as to whether or not at least $65 million in claims were secured or unsecured; (c) no real attempt had even been made by the Trustees to value the assets of the Chapter X estate; (d) no serious efforts to formulate a plan of reorganization had even been attempted, notwithstanding the Trustees' previous representations to the Bankruptcy Court that the filing of a plan of reorganization was imminent.

9. Having heard all of this testimony, at the conclusion of the trial, Bankruptcy Judge Ryan expressed his sentiments that he was persuaded by all of the evidence that the relief requested by Sulmeyer should be granted. Bankruptcy Judge Ryan's only reservation was as to calendar congestion in the California Court and whether or not a trial preference could be obtained.

10. On May 26, 1976, Judge Ryan entered an order modifying the stay, directing the parties to make application to the California Court for a trial preference and to report to him on or before July 8, 1976 as to the results of the application.

11. At Bankruptcy Judge Ryan's direction, as contained in his order of May 26, 1976, an application was made to the California Court for an advanced trial date of the California Lawsuit. On June 28, 1976, with the concurrence of the attorneys for the parties to this appeal, the California Court fixed

November 29, 1976, as the date of commencement of the jury trial:

12. The date of November 29, 1976, represents a trial date within six months of the trial before Bankruptcy Judge Ryan. At the trial, the California attorney for the Trustees had estimated that with a preference, a trial date within eight months would probably be obtained. Further, it was estimated that pre-trial discovery would take at least four months to complete, provided the parties cooperated fully and depending upon the results of discovery.

13. Thus, a trial date of November 29, 1976, in the California Court, represents the earliest date of trial consistent with the necessity for extensive discovery, preparation of witnesses for testimony and other trial preparation. Moreover, it serves, as found by Bankruptcy Judge Ryan, the interests of justice and convenience of parties and witnesses, and preserves the parties' right to a jury trial, which " . . . is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Foust v. Munson, 299 U.S. 77, 84 (1936).

14. Notwithstanding the foregoing, on July 9, 1976, the Trustees applied to Judge Ryan for an order "fixing a trial date of September 15, 1976, or as soon thereafter as his calendar would permit," in the Bankruptcy Court, of the Trustees' objection to Sulmeyer's claim filed in the Reorganization Cases.

15. No evidence of probative value was submitted by the Trustees at the hearing of July 20, 1976. In his order of July 23, 1976, denying the Trustees' application in all respects, Bankruptcy Judge Ryan stated his conclusion that, "[no] cause has been shown to indicate that there should be any relief granted inconsistent with the prior decision on the adversary proceeding."

[Stenographic Transcript, July 20, 1976, page 38]. On that basis, Bankruptcy Judge Ryan signed and filed the order of July 23, 1976, directing the prosecution and jury trial of the California Lawsuit in the California Court, which is scheduled to commence on November 29, 1976.

16. In the order dated July 23, 1976, Judge Ryan stated his findings of fact, based upon the evidence adduced on May 21, 1976, after a full day's trial with live testimony, that:

> "8. No prejudice, harm or disability is incurred by the Reorganization Trustees and the reorganization cases by modification of the automatic stay under Chapter X Rule 10-601 so as to allow the prosecution and trial of the California Action [Lawsuit].
>
> "9. The prosecution and trial of the California Action as authorized by the Court is in the interests of justice and convenience of the parties and potential witnesses."

17. On September 1, 1976, after oral argument conducted on August 23, 1976, Judge Cannella signed the opinion and order which is the subject of Sulmeyer's appeal to this Court, setting aside Bankruptcy Judge Ryan's order of July 23, 1976, thereby reinstating the stay of suits against the continued prosecution and jury trial of the California Lawsuit.

18. In his three page opinion, citing no legal authority whatsoever, and making no reference to Bankruptcy Judge Ryan's findings of fact, which cannot be set aside unless "clearly erroneous," and without adequate explanation of his reasons therefor, Judge Cannella decided that Bankruptcy Judge Ryan had abused his discretion in having modified the stay.

19. Further, Judge Cannella's order:

> a. Withdrew his general reference of the Reorganization Cases to Bankruptcy Judge Ryan, insofar as the Esgro [Sulmeyer] claim is concerned;
>
> b. Placed a trial date of October 18, 1976 on Judge Cannella's calendar of the

Trustees' objection to Esgro's claim;

c. Directed that all pre-trial discovery be completed by September 27, 1976;

d. Directed the parties to stipulate to facts by October 12, 1976.

20. Judge Cannella's order disregards the compelling interests which Bankruptcy Judge Ryan sought to preserve in allowing the prosecution and jury trial of the California Lawsuit, in the sole interest of commencing a non-jury trial, in a summary proceeding, only approximately one month in advance of November 29, 1976. Further, Judge Cannella arbitrarily fixed the trial date and the deadline for completion of discovery, without consulting with the parties as to whether or not those dates were realistic or could be complied with.

21. Arthur L. Sherwood, Esq., a member of the firm of Gibson, Dunn & Crutcher, Los Angeles, California, attorneys for Sulmeyer in the California Lawsuit, is the attorney who has represented Esgro in the California Lawsuit since its commencement in 1972. Mr. Sherwood has advised me that pre-trial discovery, which has proceeded under the auspices and control of the California Court, can not, as presently scheduled and contemplated, be completed before the end of October 1976. Furthermore, dependent upon a determination of where the trial will be conducted, the extent of further discovery, the preparation of witnesses and the general preparation for trial, which substantially differs in a jury or non-jury trial or in a California State Court or Federal Court, where procedural and evidentiary rules differ, makes for great uncertainty and substantially increases the financial burden on the parties and the work required of their respective counsel. If the trial is conducted in New York, various witnesses whom Sulmeyer intends to subpoena for the trial in California, will

not appear, and if time permits, these witnesses will have to be deposed in California and depositions used in place of live testimony. In sum, the entire complexion of the trial will differ dependent upon the ultimate forum. The trial date fixed by Judge Cannella, if it stands, requires Sulmeyer to reschedule substantial discovery already in progress; meetings to prepare witnesses for testimony at trial; and other necessary matters. Mr. Sherwood has further advised me that he has a trial in another matter fixed to commence on November 1, 1976.

22. The uncertainties created by Judge Cannella's decision impose substantial hardships on Sulmeyer. Moreover, if the instant appeal is not expedited and if a decision is not rendered by this Court shortly, the issues raised on this appeal will become moot. Should the jury trial date of November 29, 1976, granted by the California Court, not be utilized, it is unlikely another preference will be granted by that court. Finally, the deadlines imposed by Judge Cannella's order necessitate an expedited determination of this appeal.

23. In view of all of the foregoing, deponent submits that this Court should grant Sulmeyer's motion in all respects and enter an order:

a. Directing the immediate transmittal to this Court of the record on appeal;

b. Directing the entry of Sulmeyer's appeal on the Court's docket at the earliest possible time and fixing a date for oral argument of the appeal as soon as the Court's calendar permits;

c. Directing that all briefs and appendices be filed with the Court in an expedited fashion consistent with a speedy determination of the appeal;

d. Granting such other and further relief as is just and proper.

Bruce R. Zirinsky

Sworn to before me this
3rd day of September, 1976

Notary Public

SECOND CIRCUIT

A530

TITLE OF CASE

In re INTERSTATE STORES, INC.,

formerly known as INTERSTATE DEPARTMENT STORES, INC., et al,

Debtors,

CIVIL APPEAL
SCHEDULING ORDER # 2

Docket No. 76-5029
76-5034

DOMINICK'S FINER FOODS, INC.,

Appellant.

IRVING SULMEYER, As Receiver for the Estate of Esgro, Inc., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

v.

Joseph R. Crowley, et al.,

Defendants-Appellants-Appellees.

Noting that Weil, Gotshal & Manges counsel for (appellant/~~appellee)~~ Irving Sulmeyer

has filed a motion for an expedited appeal

and being advised as to the progress of the appeal, Civil Appeal Scheduling order dated 8-27-76 is modified only in the following respects:

IT IS HEREBY ORDERED that the record on appeal be filed on or before September 15, 1976.

IT IS FURTHER ORDERED that the appellant's brief and the joint append be filed on or before September 22, 1976

IT IS FURTHER ORDERED that the brief of the appellee be filed on or before ~~September 30, 1976.~~ October 1, 1976.

IT IS FURTHER ORDERED that ten (10) copies of each brief shall be filed with the Clerk, but that the court may require as many as fifteen (15 additional copies before final disposition of the action.

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of October 12, 1976.

IT IS FURTHER ORDERED that in the event of default by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of the appellant regarding any other provision of this order, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief with the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

A. DANIEL FUSARO,
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

In re : Reorganization Nos.
74 B 614-802

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., :

AFFIDAVIT IN OPPOSITION TO MOTION FOR A STAY

Debtors. :

-----------------------------------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARTIN I. SHELTON, being duly sworn, deposes and says:

1. I am a member of the firm of Shea Gould Climenko & Casey attorneys for the Trustees of the above captioned debtors. I make this affidavit in opposition to the motion of Irving Sulmeyer ("Sulmeyer"), receiver for the Chapter XI Estate of Esgro, Inc. ("Esgro"), one of the claimants in this proceeding, for a stay of this Court's September 1, 1976 decision and order pending Sulmeyer's appeal from that decision.*

2. As the Court will recall, Esgro has filed a claim (No. 7273A) in this proceeding for in excess of $38,000,000 and until that claim is resolved, the Trustees are effectively precluded from formulating a plan of reorganization. As the Court stated in its September 1 decision, "Even a minor delay at this juncture would place an undue burden on these reorganization proceedings". Therefore, the Court set aside Judge Ryan's denial of the Trustee's motion for an order setting the Trustee's

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* Sulmeyer purports to move pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. However, that rule, which relates to "an appeal . . . taken from an introductory or final judgment granting, dissolving or denying an injunction" would not appear to be applicable.

objection to Esgro's claim down for trial on September 15, 1976 (or as soon thereafter as the Court's calendar permitted) and directed that the trial of said objection begin on October 18, 1976 before the Court and that discovery be completed by September 27. For various reasons set forth in the moving papers, Sulmeyer would now, in effect, have the Court reverse its September 1 order by directing that the order be stayed until at least October 12, the earliest date on which the appeal will be heard.

3. As noted in the moving papers*, Sulmeyer applied to the Court of Appeals for an order expediting his appeal from the September 1, 1976 order, advancing in support of that application essentially the same arguments which are now made to this Court. The Court of Appeals granted the motion for a reference, which we did not oppose, and directed that the appeal be ready to be heard by October 12, 1976. A copy of the Court of Appeals' September 7, 1976 order is annexed hereto as Exhibit A.

4. The first argument advanced by Sulmeyer in support of his application is that discovery cannot be completed by September 27, the deadline fixed by the Court. Reference is first made to Sulmeyer's California Counsel's advice to Sulmeyer's New York Counsel (whose affidavit is submitted in support of the application) to the effect that "pretrial discovery is presently outstanding in the action and cross-action between the parties in the Superior Court of the State of California" and that "[b]ased upon information which Sulmeyer expects to obtain in outstanding discovery, additional discovery will be required and will not be completed until the end of

---

* References to the moving papers are to the September 8, 1976 affidavit of Bruce R. Zarinsky of Weil Gotshal & Manges, New York attorneys for Sulmeyer.

October, 1976". I respectfully suggest that this argument need not concern the Court for a number of reasons:

(i) The Trustees objection to Esgro's claim was served on April 9, 1976 at which time Requests for Admission, Interrogatories and a deposition notice was also served. Other deposition notices were served shortly thereafter. Other than the service of 18 broadly stated interrogatories and an equally broadly stated document request, Esgro conducted virtually no discovery until it deposed two of the debtors former directors in New York on August 20, 1976 (after noticing four such depositions). Therefore, any problem Esgro has with this Court's discovery deadline is of its own making.*

(ii) The only "outstanding discovery" presently pending by Esgro (other than the deposition referred to above) is the direction by the California Court that the Trustees provide certain information concerning other licensees of White Front Stores, such as the identity of said licensees.** Esgro was a licensee of White Front for over 15 years. Therefore, one must assume that it knows the identity of these other licensees and, therefore, the fact that it has not yet obtained such information from the

---

* Esgro also noticed the deposition of three of the debtors former employees for this week in California but later advised us that it would proceed with only one of these depositions which is to take place tomorrow. Also we have cooperated with Esgro's attorneys in rescheduling the depositions of two other former officers of the debtor in New York for next week.

** Also we are presently in the process of reproducing a voluminous quantity of documents which were previously made available to Esgro's attorneys. Rather than inspect these documents when produced Esgro's attorneys requested they be reproduced en masse.

Trustees, should not have delayed any discovery it might have seriously wanted to conduct along these lines.

(iii) With the exception of certain information which is requested in interrogatories, which are due to be answered shortly, and a document request which lists documents that were for the most part requested almost two months ago, the Trustees discovery as it relates to Esgro Claim 7273A and the objection thereto, is completed. Therefore, the Trustees have no problem whatever with the Court's September 27, 1976 discovery deadline.

5. On the discovery point, Sulmeyer also argues, again based upon advice from California Counsel to New York Counsel, that discovery has heretofore been scheduled in anticipation of the November 29, 1976 California trial date. It is added that if the claim is to be tried in New York, additional witnesses who cannot be compelled to appear in New York will have to be deposed in California. First, the discovery schedule referred to was arranged at a time when the Trustees appeal from Judge Ryan's order was pending before the Court and it was expressly agreed that the schedule would have to be accellerated if this Court acted favorable on that appeal. In this regard I annex hereto as Exhibit B an August 24, 1976 letter from Esgro's California Counsel which, on page 2 confirms this fact. Moreover, the Trustees appeal from Judge Ryan's order was taken in mid-July. Therefore, I respectfully suggest that Esgro's counsel acted at its own peril in planning their discovery schedule "in anticipation of a jury trial commencing November 29, 1976". Finally, no attempt is made to identify the "additional [California] witnesses" who will have

to be deposed. The only information I have on this point is that Esgro had scheduled the deposition of three California witnesses for this week and then cancelled two of these depositions - after I might note, counsel for the Trustees went to great expense travelling to California to interview the witnesses involved.

6. As a final point on the "discovery" aspect of its argument, Esgro argues that trial preparation will be "significantly" affected because the "scope of discovery and the manner in which the case is to be tried will differ depending on where the case is tried". I am at a loss to determine what point Esgro is trying to make by this argument. The place of trial has been in doubt since early May when Esgro filed its Complaint under Rule 10-601 seeking modification of this Court's stay of suits so as to permit Esgro's claim to be tried in the California Court. Even if this Court were to grant the instant motion, I do not see how it would alleviate the situation. The parties will still be proceeding with discovery and trial preparation and surely Esgro will not be able to assume that the trial will be held in California. Also, in this regard, I note that Judge Ryan's original order in this matter, entered on May 26, 1976, directed that all discovery proceed on the basis that it could be used either in the California proceeding or in this proceeding depending upon where Esgro's claim was tried. Esgro's counsel readily agreed to this and raised no objection to the alleged significant effect it would have on "trial preparation".

7. Next, under the heading of "prejudice" Sulmeyer will suffer if the trial commences on October 18, 1971, it is argued that the trial will take from five to eight weeks to complete. This argument has already been considered by the Court

in connection with its September 1 decision. As we previously advised the Court, the Trustees' objection to Esgro's claim, in our opinion, will take at the most two weeks to try and possibly could be completed in one week. The vast majority of the Trustees evidence will be in the form of either documents (whose authenticity is not disputed) or depositions conducted in the course of pretrial discovery. Since this matter will be tried to the Court, the presentation of such evidence will take very little actual trial time.

8. Also, under the heading of "prejudice" it is argued by New York Counsel that California Counsel "who are most familiar with the case and who plan to try the case" have trials in other matters "scheduled to commence", in the case of one attorney (Mr. Sherwood), on November 1 and, in the case of another (Mr. Howell), on October 15 and that it "is virtually impossible . . . to reassign their caseload without substantial prejudice to the interest of their clients". To this is tacked on a due process argument that "Sulmeyer may be deprived of its right to adequate counsel", an argument which is apparently based upon the assumption that California Counsel will elect to proceed with the trial of their other clients' matters rather than the trial of Sulmeyer's claim. This argument, of course, ignores the substantial prejudice the estate has already suffered by reason of its inability to have the Esgro claim adjudicated and the prejudice that it will suffer by any further delays. However, I also note that no mention is made of the possibility of California Counsel obtaining adjournments of these other trial commitments, one of which will probably not even conflict with the trial herein, or the alternative of having another attorney (such as Esgro's New York Counsel who has been representing Esgro since early May) familiarize himself with

the case in the next month should it not be possible for either Mr. Sherwood or Mr. Howell to rearrange their trial schedules.

9. Finally it is argued that the appeal may be rendered moot unless the September 1, 1976 order is stayed. Of course, the other side of the coin, which is ignored in the moving papers, is that this court's September 1, 1976 order will be nullified if the relief requested is granted. In this regard, I again point out that the Court of Appeals, after being presented with essentially the same arguments as those presented here, and without objection by the Trustees, entered an order directing that the appeal be ready for argument on October 12, 1976. It was obviously not concerned with the "mootness" arguments and therefore, I respectfully suggest, this Court need not be concerned with it.

10. For all of the foregoing reasons, I respectfully request that the instant motion be denied in all respects.

Martin I. Shelton
MARTIN I. SHELTON

Sworn to before me this
13th day of September, 1976.

S/ Daniel E. Carroll

DANIEL E. CARROLL
Notary Public, State of New York
No. 41-4500320
Qualified in Queen County
Commission Expires March 30, 1977

C-8 **SECOND CIRCUIT** A 539

UNITED STATES COURT OF APPEALS
FILED
SEP 7 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

CIVIL APPEAL
SCHEDULING ORDER # 2

76-5029

Docket No. 76-5029
76-5034

76-5034

TITLE OF CASE

In re INTERSTATE STORES, INC.,

formerly known as INTERSTATE DEPARTMENT STORES, INC., et al,

Debtors,

DOMINICK'S FINER FOODS, INC.,

Appellant.

IRVING SULMEYER, As Receiver for the Estate of Esgro, Inc., a Debtor in Chapter XI,
Plaintiff-Respondent-Appellant,

v.

Joseph R. Crowley, et al.,

Defendants-Appellants-Appellees.

Noting that Weil, Gotshal & Manges counsel for (appellant/~~appellee)~~ Irving Sulmeyer

has filed a motion for an expedited appeal

and being advised as to the progress of the appeal, Civil Appeal Scheduling order dated 8-27-76 is modified only in the following respects:

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IT IS FURTHER ORDERED that the appellant's brief and the joint appendix be filed on or before September 22, 1976

IT IS FURTHER ORDERED that the brief of the appellee be filed on or before ~~September 30, 1976~~ October 1, 1976.

IT IS FURTHER ORDERED that ten (10) copies of each brief shall be filed with the Clerk, but that the court may require as many as fifteen (15) additional copies before final disposition of the action.

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IT IS FURTHER ORDERED that in the event of default by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of the appellant regarding any other provision of this order, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

A. DANIEL FUSARO,
Clerk

A 540

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August 24, 1976

WRITER'S DIRECT DIAL NUMBER
488-7121

OUR FILE NUMBER
T 8853-27

Daniel L. Carroll, Esq.
Shea, Gould, Climenko
& Casey
330 Madison Avenue
New York, N. Y. 10017

Re: White Front Stores, Inc. v. Esgro, Inc., et al.

Dear Dan:

This letter will serve to summarize the various matters which we discussed in New York last week.

1. We have agreed to block out time for the following depositions:

A. Gary Mintz, to take place in Los Angeles on September 13-14, 1976;

B. Julian Lavitt, to take place in Los Angeles on September 15-16, 1976;

C. Alan Keroes, to take place in Los Angeles on September 17, 1976;

D. Walter Craig, to take place in New York on October 6-7, 1976;

E. Sol Cantor, to take place in New York on October 8 and 12, 1976;

F. Monroe Chapin, to take place in New York on October 13, 1976;

G. Messrs. Robert Reisner and Robert Van Tuyl, to take place at or near Boca Raton, Florida, on October 14-15, 1976.

You have agreed to make Messrs. Cantor, Craig and Chapin available for the depositions scheduled as set forth above. I will arrange for the appearances of the others. As we discussed also, this schedule assumes that trial will commence in the Superior Court in Los Angeles in late November 1976 and should, for any reason, there be an earlier trial date ordered in New York, this deposition schedule will have to be accelerated significantly.

2. During our discussions in New York, I thought we had tentatively agreed upon a solution to your seeking further answers to the "New York" set of White Front interrogatories. Upon my return to my office here in Los Angeles I found that a Motion for further interrogatory answers had been filed on behalf of White Front, with your firm's name on it, of course. As I had already indicated to you, while I believe that such a Motion is not timely, I am very surprised that you made no mention of the filing of this Motion when we spoke. In any event, the filing of this Motion by White Front obviously means that you are no longer willing to further explore the agreement we discussed in New York.

3. You have still not produced for our inspection a number of documents which had been promised for production, including the following:

A. White Front consolidated and store-by-store operating result sheets for the years 1968 through 1973;

B. Minute Books for each of the White Front corporations;

C. Computer print-outs for the months of October and November 1970 and October and November 1972;

D. The financial statements and any written reports and/or studies presented to members of the Board of Directors of Interstate at the various me from 1969 through 1973.

Daniel L. Carroll, Esq.
August 24, 1976
Page Three

So as to obviate the need for a Motion for the production of these documents, and sanctions, would you please let me know as soon as possible when we may expect the production of these documents or copies thereof.

4. With respect to your letter of August 17, 1976, I have a recollection of your saying, during the course of Mr. Esgro's deposition, that you were going to undertake to list specific documents which you wanted. It will be interesting to see whether this appeared on the transcribed portion of that deposition. In any event, we will try to put together a set of copies of the documents you request and those you requested during the course of Mr. Esgro's deposition, so far as our notes disclose them.

5. We have agreed that it makes sense for both of us to update the respective Complaint and Cross-Complaint in this state court action and, depending upon the results of the current appeal in the bankruptcy matter in New York, we should both undertake to do this as soon as possible.

Very truly yours,

Arthur L. Sherwood
of GIBSON, DUNN & CRUTCHER

ALS:ma

copy sent to [illegible]
[illegible]

Index No. *Year 19*

AFFIDAVIT OF SERVICE BY HAND

WEIL, GOTSHAL & MANGES

Attorneys for

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022
(212) 758-7800

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon.* *one of the judges of the within named Court,* *at* *on* *19* *, at* *M.*

Dated:

WEIL, GOTSHAL & MANGES

Attorneys for

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022

To:

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

Check Applicable Box

☐ Attorney's Certification
certify that the annexed
has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation
say that: I am the attorney of record, or of counsel with the attorney(s) of record, for
. I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification
in the action herein: I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification
the of
a corporation, one of the parties to the action: I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed
in the following manner:

Check Applicable Box

☐ Service By Mail
by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service
by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on , 19

(Print signer's name below signature)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
---------------------------------------x

In re :

INTERSTATE STORES, INC., et al., :

Debtors, :

IRVING SULMEYER, as Receiver for :
the Estate of ESGRO, INC., a
Debtor in Chapter XI, :

Plaintiff-Respondent- :
Appellant,
:
-against-
:
JOSEPH R. CROWLEY and HERBERT B.
SIEGEL, as Reorganization Trustees :
for WHITE FRONT STORES, INC., et al.,
:
Defendants-Appellants-
Appellees. :

---------------------------------------x

76-5034

AFFIDAVIT OF SERVICE
BY HAND

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARK A. RIBAUDO, being duly sworn, deposes and says:

1. I reside at 128 Lakeview Avenue, Lynbrook, Long Island 11563, I am over 18 years of age and I am not a party to the within proceedings.

2. On September 21, 1976, I personally delivered and served a Joint Appendix to the briefs in the above-captioned case upon Shea, Gould, Climenko & Casey, at 330 Madison Avenue, New York, New York.

Mark A. Ribaudo
Mark A. Ribaudo

Sworn to before me this
22 day of September, 1976

Ruth Miller
Notary Public

RUTH MILLER
Notary Public, State of New York
No. 03-7952625
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1978

BEST COPY AVAILABLE